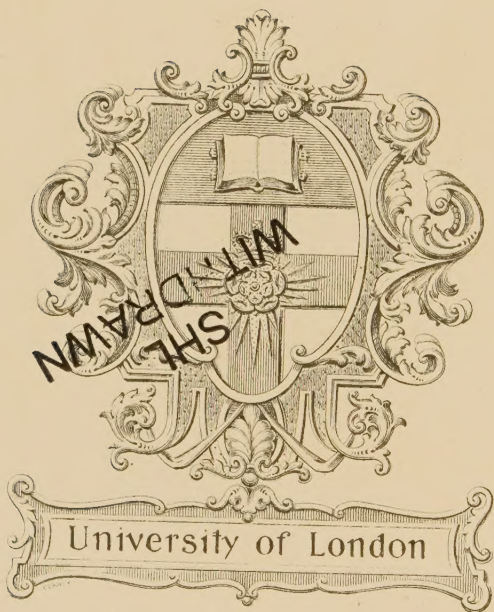






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THE BRITISH YEAR BOOK OF
INTERNATIONAL LAW

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International Affairs*

THE
BRITISH YEAR BOOK OF
INTERNATIONAL LAW
1926

SEVENTH YEAR OF ISSUE

HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS
London Edinburgh Glasgow Copenhagen
New York Toronto Melbourne Cape Town
Bombay Calcutta Madras Shanghai

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Printed in England at the Oxford University Press by John Johnson



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THE COUNCIL'S REQUEST FOR AN ADVISORY OPINION FROM THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By ARNOLD D. McNAIR, C.B.E., LL.D.,

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I. INTRODUCTORY.

A FEW pages may, I think, profitably be devoted to the consideration of the question whether under the Covenant of the League the Council must be unanimous in requesting the Permanent Court of International Justice to give an advisory opinion, and, if so, what is meant by unanimity for this purpose. The Assembly may also make these requests, but it is not proposed to discuss these questions as they affect that body.

The importance of the answers to these questions lies in the fact, to which attention has recently been drawn by several writers, that if the Council can by a majority request the Court to give an advisory opinion, there is already in existence a degree of obligatory jurisdiction which will be effective in the vast majority of cases ; because, if one party or both parties to a dispute refuse to go to the Court directly in a litigant capacity and ask for a judgment, they may find themselves compelled to go indirectly and to assist the Court in giving an advisory opinion.

Article 14 of the Covenant is as follows :

“The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly. (*Elle donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée.*)”

Article 4, paragraph 5, provides that :

“Any Member of the League not represented on the Council shall be invited to send a representative to sit as a member at any meetings of the Council

during the consideration of matters specially affecting the interests of that Member of the League."

Article 5 is also relevant :

"Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions (*les décisions*) at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

"All matters of procedure (*toutes questions de procédure*) at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council, and may be decided by a majority of the Members of the League represented at the meeting."

The Statute of the Court somewhat strangely does not mention advisory opinions,¹ the Rules of Court (Articles 71 to 74) regulate the procedure to be followed in such cases. The Statute appears only to contemplate formal litigation, and the first paragraph of Article 36 may be quoted :

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force."

Then follows what is called the "optional-compulsory" clause.

The Rules of Procedure of the Council² do not carry the matter any farther than the Covenant. Article 8 of the Rules of Procedure is virtually a repetition of Article 5 of the Covenant.

It is worth noting that, while the Covenant (Article 14) specifically empowers the Court in its discretion to give advisory opinions (may give, *donnera*), it nowhere specifically empowers the Council to make requests for them.

II. THE VIEWS OF COMMENTATORS.

I propose to begin by collecting some of the views already expressed upon the topic of investigation.

Mr. Fachiri,³ in discussing the advisory opinion upon the Tunis and Morocco Nationality Decrees, remarks that "this case shows that the advisory jurisdiction offers, in cases of a legal nature, an indirect means of access to the Court which, in practice, is capable of being used as a not ineffective sub-

¹ The Committee of Jurists' Draft Scheme contained an article dealing with advisory opinions, but it was suppressed by the Assembly Sub-committee. See Fachiri, *Permanent Court of International Justice*, pp. 67, 295, 321.

² *League of Nations Official Journal*, 1920, pp. 272-4.

³ *Op. cit.*, p. 155.

stitute for direct compulsory jurisdiction.” But, as he points out, in this case the British and French representatives on the Council concurred in proposing to the Council that the Court should be asked to give an advisory opinion; so that the case throws no light on the question whether the Council could have made the request if France, having already refused the British proposal to submit the dispute to the Court directly under Article 13 of the Covenant, had likewise refused to consent to or concur in the Council’s request for an advisory opinion. Elsewhere¹ Mr. Fachiri appears to incline to the view that it is impracticable to refer a dispute for an advisory opinion without the consent of the parties for the following reasons :

“ Under Article 4, paragraph 6, of the Covenant, any Member of the League not represented on the Council must be invited to send a representative to sit as a member at any meeting of the Council specially affecting the Member ; under Article 5, paragraph 1, except where otherwise expressly provided in the Covenant, decisions at any meeting of the Assembly or Council must be taken unanimously by all the States represented at the meeting ; and under Article 14 there is no provision that the decision to refer a dispute to the Court for advisory opinion shall be other than unanimous.”

Professor Manley Hudson refers to the matter in his lectures delivered at The Hague Academy of International Law in August, 1925.² In discussing the consideration by the Council in 1923 of the question of the expropriation by the Roumanian Government of the property of Hungarian optants, he points out that the *ad hoc* Hungarian representative on the Council claimed that the Council could request an advisory opinion by a majority vote, but it became unnecessary to decide this point. In *America and the World Court* (New York *Times*, January 31, 1926), Professor Hudson writes : “ It is not certain that any Member of the League of Nations interested may prevent the Council from asking the Court for an opinion.”

Professor Baker³ definitely asserts that a request for an advisory opinion is a matter of procedure and can be made by the Council by a majority vote. His argument in favour of the view rests mainly “ on the essential difference between a judicial

¹ *Op. cit.*, pp. 163–4, and p. 70 (n.).

² *The Advisory Opinions of the Permanent Court of International Justice*. Carnegie Endowment, International Conciliation, Publication No. 214, November, 1925.

³ *The Obligatory Jurisdiction of the Permanent Court in the British Year Book of International Law*, 1925, at pp. 74, 75. See also Baker, in the *History of the Peace Conference of Paris* (Temperley), Vol. VI, at p. 497, to the same effect.

verdict by the Court and an advisory opinion." Just as the Council may inform itself as to economic or other technical matters by the appointment of committees (which, by the express terms of Article 4 of the Covenant, can be appointed by a majority vote), so also, he argues, may the Council seek from the Court advice upon points of law as a matter of procedure; this does not "involve the complete transference of the whole dispute to the Permanent Court."

An article on *The League of Nations and Unanimity*,¹ by Sir John Fischer Williams, K.C., while not specifically dealing with the point under discussion, contains some relevant material of value. His analysis of the meaning of the term "decision" in Article 5, seriously undermined as it is by the competition of "wishes," "views," "hopes," "opinions" and "recommendations" whenever it is desired to escape the strait waistcoat of unanimity, leads one to think that there can be no question that the Council's request to the Court for an advisory opinion is a "decision" within the meaning of Article 5. Again, he expresses the view (at p. 486) that "if either Council or Assembly has to decide whether any particular question is or is not one of procedure, unanimity appears to be required (see the discussion in the First Assembly, 19th Plenary Sitting, 11th December, 1920)." If that is so, an interested disputant who is prepared to use his vote unconscientiously has virtually a power of veto upon a request for an advisory opinion.

So also Professor Schücking and Dr. Wehberg² express the opinion that, on the question whether any particular matter is one of procedure or not, the Council itself must come to a decision, and that decision must be unanimous. With the question whether this decision requires absolute unanimity or merely limited unanimity, neither they nor Sir John Fischer Williams expressly deal; although the decision may have to be arrived at by the Council in the course of handling a dispute under Article 15, it is not taken under paragraph 6 of that Article in which limited unanimity is prescribed.

Mr. Paul Mantoux, the Director of the Political Section of the League, addressing in his private capacity the British Institute of International Affairs in November, 1925, said: ³

¹ *American Journal of International Law*, Vol. XIX (1925), pp. 475-88.

² *Die Satzung des Völkerbundes*, 2nd ed., p. 337.

³ See the *Journal of the British Institute of International Affairs*, Vol. V, No. 1 (January, 1926), at p. 217.

“The question has been raised several times as to whether the Council may ask for an advisory opinion without the consent of the parties to the dispute. That question has of set purpose never been given a general and abstract answer. But precedents show that the practical answer is more likely to be in the affirmative when the question is one of procedure, and in the negative when the advice asked of the Court is of such a nature as to affect the substance of the case.”

This expression of opinion is markedly confirmed by the discussion in the Council a month later upon the adoption of the Court's Mosul Advisory Opinion.¹

III. INFERENCES FROM DISCUSSIONS IN THE COUNCIL.

CORFU. In September, 1923,² Viscount Cecil proposed that the advisory opinion of the Court should be taken on the legal questions arising out of the Corfu affair. Signor Salandra objected, and thereupon there was substituted a proposal to refer the questions to a committee of jurists, and this proposal was carried unanimously (p. 1352). It is, however, interesting to note that twice in the course of the discussion upon Viscount Cecil's proposal (at p. 1345 and p. 1350) he refers to the necessity of reaching a unanimous conclusion, which seems to have been assumed to be the case. It is interesting to note, though it is in no way conclusive, that the question whether the legal points should be referred to the Court or to another body for an opinion is described in the Minutes of the Council (p. 1330) as a “Question of Procedure.”

MOSUL. It is not clear from the minutes³ how the Council voted (if at all) on the decision to request the Court for an advisory opinion on the nature of the functions of the Council in the Mosul dispute. The Turkish representative expressed the view (p. 1381) that this course was unnecessary, but all that we learn of the voting is the mere statement (p. 1382) that “the Council adopted the conclusions of the Committee” which recommended this course. Whether there was an actual vote or not is not clear.

Some discussion on the meaning of the term “matters of procedure” took place in the Council in December, 1925, when

¹ See below, pp. 5-6.

² *League of Nations Official Journal*, November, 1923.

³ *Ibid.*, October 1925, pp. 1377-82. It is rumoured that for a time one state represented on the Council (not Turkey) was unwilling to concur in the request for an advisory opinion.

that body considered the question of adopting the advisory opinion of the Court on the frontier between Turkey and Iraq.¹ The Turkish representative who was present argued that the opinion could only be adopted by the Council by a unanimous vote in which the votes of Great Britain and Turkey must be included. The President of the Council (M. Scialoja) expressed the view (p. 127) :

“ that for the proposed vote the Council could apply the rule provided in the Covenant for the regulation of questions of procedure. The question to be settled was in fact, a question of procedure. In any case, however, according to the Covenant the votes of the interested states were not counted in calculating unanimity.”

And again he said (p. 128) :

“ that the Council was at present dealing with the preliminary question of the action to be taken as the result of the advisory opinion.”

Finally, after an adjournment, the President explained his point of view as follows (p. 128) :

“ that according to the definition of questions of procedure laid down in the Covenant, the Council might even perhaps vote by a simple majority, since there was no question in the advisory opinion of the Permanent Court at The Hague which *dealt directly with the main problem* (italics mine). This opinion merely dealt with questions of competence which the Council had frequently defined as questions of procedure. He thought, however, that in the present case the Council might follow a stricter rule, in accordance with the principle contained in Article 15 of the Covenant, which contemplated a unanimous vote, but in reckoning unanimity the votes of the interested states should not be counted.”

Thereupon, the question being put to the vote,

“ The report of M. Uden in favour of accepting the advisory opinion of the Permanent Court of International Justice at The Hague was unanimously adopted, the representative of Turkey voting against the report ” (p. 128).

Paraphrasing Signor Scialoja's observations, which, in view of his personal standing and long experience as a member of the Council, carry much weight, I think his view amounts to this : that the question whether the Council's decisions to *adopt* an advisory opinion of the Court is a matter of procedure or not cannot be answered by a simple affirmative or negative ; it depends on the content of the opinion which may be procedural or substantive ; in this case the content was procedural, and

¹ *League of Nations Official Journal*, February, 1926, pp. 120-9.

the Council might have acted by a simple majority, although, he considered it safer to vote under Article 15, requiring unanimity in the restricted sense of that Article. Further, I venture to suggest that it may be inferred from his observations that by parity of reasoning he would regard a decision to *request* an advisory opinion as being in the same position, and that the answer to the question whether such a request is a matter of procedure or not would depend on the answer to the question whether the content of the point referred to the Court was substantive or procedural.

IV. INFERENCES FROM OBSERVATIONS MADE BY THE PERMANENT COURT.

Indirect light upon the topic under inquiry is obtainable from the practice and utterances of the Court itself. (*a*) In the Eastern Carelia Advisory Opinion¹ arising out of certain articles of the Treaty of Dorpat, the Court stated that :²

“ There has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. It is unnecessary in the present case to deal with this topic.”

Yet, as Russia declined to acknowledge the intervention of the League or the competence of the Court or render any assistance, the Court declined to do what was, in substance, compelling Russia to litigate against her will.

But in the advisory opinion arising out of the Mosul dispute between Great Britain and Turkey upon the interpretation of Article 3, paragraph 2, of the Treaty of Lausanne, the refusal of Turkey to appear and plead did not prevent the Court from giving an opinion. In this case, however, Turkey had by that clause of the Treaty recognized the jurisdiction of the Council ; had subsequently taken a seat *ad hoc* on the Council and agreed to accept the decision of the Council, and had indeed sent to the Court a memorandum of her views upon the matters in dispute ; whereas Russia had never recognized the jurisdiction of the League in regard to her dispute with the inhabitants of Eastern Carelia. Moreover, the Court³ was astute in the Mosul opinion to

¹ Publications of the Permanent Court of International Justice, Series B, No. 5.

² At p. 27.

³ Publications of the Permanent Court of International Justice, Series B, No. 12, at p. 18. A general discussion by the Court of the rule of unanimity in international law will be found in this opinion at pp. 29–32.

"observe that it intends strictly to confine itself to consideration of these questions, without in any way prejudging the merits of the problem before the Council ; nothing in the present opinion, therefore, is to be interpreted as anticipating the solution of that problem."¹

V. THE AMERICAN RESERVATIONS.

The Fifth Reservation attached by the Senate to the adherence of America to the Court provides :

"That the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States, and after public hearings or opportunity for hearing given to any State concerned ; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

Without stopping to discuss the full import of this, for instance, the question whether it only applies to a "dispute or question" in which America is actually at the time involved or also covers one in which America, though not at the moment involved, is potentially interested, such as the right to discriminate against immigrants, we may notice the assumption on which this Reservation rests. Its supporters argued as follows : if America belonged to the League, she would have had a permanent seat on the Council, and would have been able to veto any request for an advisory opinion, because the Council must be unanimous in making the request ; this Reservation, therefore, places her in the position of a member of the Council by enabling her to veto any request for an opinion in a matter in which she is interested. No conclusion upon the point under discussion can be drawn from this Reservation, because, whether absolute unanimity is required of the Council or not, it is intelligible that the United States should wish to make quite sure of having a veto upon any request for an advisory opinion affecting herself. *Abundans cautela non nocet.*

VI. GENERAL.

There are, it seems, three possible conditions for the validity of a vote by the Council :

- (a) *absolute unanimity*, for instance, to elect a new permanent member of the Council ;

¹ See Manley Hudson in *American Journal of International Law*, Vol. XX (1926), pp. 332-3.

- (b) *limited unanimity*, that is excluding the representatives of interested parties, for instance, in making a report under Article 15, paragraph 6 ;
- (c) *a simple majority*, for instance, in matters of procedure, under Article 5, paragraph 2.

It may well be that the question what kind of vote the Council's request for an advisory opinion requires is not one which must always receive the same answer, and that the kind of vote is determined by the kind of "dispute or question" which is referred to the Court.

It seems probable¹ that advisory opinions may be sought upon "questions" which do not amount to "disputes" and in which there are no parties ; for instance, after the Corfu affair it was possible that the Council might have asked the Court instead of a committee of jurists to give an opinion upon the questions of law arising out of that affair. There was some discussion in the Council on that occasion² upon the question whether the Permanent Court could give an advisory opinion on an abstract question, and the second and third advisory opinions of the Court, upon the questions whether the International Labour Organization was competent to deal with agricultural matters, were referred to as precedents for the reference of an abstract question. The balance of opinion appears to have been in favour of the competence of the Court, and the President, Viscount Ishii,³ took this view. If an abstract question were referred to the Court, it is difficult to say who the interested parties would be,⁴ and to request an advisory opinion upon a question of that nature would not do the same violence to the principle of the freedom of every state (unless bound by treaty engagement) not to litigate except by its own consent. So also it seems probable from the remarks by Signor Scialoja, quoted above, that the Council is very much alive to the difference between an advisory opinion which goes to the merits of the case and one which merely states the procedure to be followed by the Council in pronouncing upon those merits.

The specific mention in Article 5 of the Covenant of "the appointment of committees to investigate particular matters"

¹ Fachiri, *op. cit.*, p. 68.

² See above, p. 5.

³ *League of Nations Official Journal*, November, 1923, at p. 1345.

⁴ The meaning of the terms "dispute" and "question" is discussed by Manley Hudson, *op. cit.*, pp. 331-2.

as matters of procedure requires consideration. On the one hand, it might be argued that this specific mention of the appointment of committees, such as a committee of jurists, excludes the process of referring a dispute or question to the Court because it is not mentioned. *Expressio unius est exclusio alterius*. On the other hand, it might be said that the mention of the appointment of committees is merely illustrative, and that a reference to the Court is only an alternative to the appointment of a committee of jurists. The former argument appears to me to be the weightier. Maxims are only guides to the intention of the contracting parties, and I do not set much store by the maxim cited. But it seems to me (i) that the appointment of committees of investigation is specifically mentioned because it appeared to the draftsmen to be near the edge of "matters of procedure," so that it was safer to refer to it in specific terms; and (ii) that legal proceedings before the most august tribunal in the world, at any rate when they are substantially equivalent to direct litigation between the parties to the dispute, cannot properly be likened to the deliberations of a committee of investigation. No English lawyer could say that the Report of a Royal Commission or a Departmental Committee was in respect of binding obligation upon the authority asking for it, namely, the Crown, comparable to the advisory opinion of the Judicial Committee of the Privy Council, for instance, upon the composition of the Irish Boundary Commission in 1924.¹

Again, it may be contended that, admitting that a request for an advisory opinion is not a mere "matter of procedure" requiring a simple majority when the opinion will be substantially equivalent to a judgment on the merits of the case, nevertheless, if the dispute is one on which the Council is aiming at making a "unanimous" report under Article 15, then, inasmuch as *limited* unanimity suffices for that report, it seems absurd to suggest that *absolute* unanimity is required for a request for an advisory opinion which is preliminary to, and in aid of, the making of that report. Such a requirement would seem to defeat the object of Article 15 and to obstruct the Council in obtaining for itself the legal advice necessary for the making of the report. Moreover, to hold that absolute unanimity is necessary for such a request addressed to the Court, while under Article 5, paragraph 2, the alternative method of the appoint-

¹ Cmd. 2214.

ment of a committee of jurists to investigate the matter could be adopted as a "matter of procedure" by a simple majority seems illogical. I think this argument ignores the peculiarly weighty character of an advisory opinion given after full argument on behalf of the parties by a tribunal like the Permanent Court of International Justice. This point is more conveniently dealt with in my next section, and no more may be said here except to notice that Article 15 contains no positive obligation to comply with the recommendations of a "unanimous" report of the Council, and that they are merely recommendations. On the other hand, Article 13 imposes a legal obligation to "carry out in full good faith any award or decision that may be rendered," from which it is not unreasonable to infer a strong moral obligation to comply with an advisory opinion which, by passing upon the merits of the dispute, is substantially equivalent to an award or decision.

VII. CONCLUSION.

Having collected these various opinions and pieces of evidence, I must confess myself very far from being able to express an opinion with much confidence. I feel that, if one looks at the Covenant as an English lawyer would look at a written contract, a fairly strong case can be made out for the view that a decision to request an advisory opinion is a matter of procedure and merely requires a simple majority of votes. Particularly impressive is the argument that, when a final report by the Council under paragraph 6 of Article 15 only requires "limited" unanimity, it is absurd that a decision to take legal advice before framing that final report should require absolute unanimity. On the other hand, the Covenant is not an English contract, but an international treaty of a very peculiar kind—indeed something more than a treaty, something between a treaty and a solemn Declaration of the Rights of Nations—and this legalistic manner of interpreting it seems to me to be out of place. It offends one's "League-sense." The dominant factor is that the Council always has adopted the advisory opinion of the Court,¹ and is increasingly unlikely to depart from that course as the Court continues to grow in prestige; therefore, the proceedings

¹ With, however, a modification in the case of Advisory Opinion No. 6, relating to settlers of German origin in Poland: see *League of Nations Official Journal*, February, 1924, pp. 360-1.

before the Court, when the case for opinion is being argued, constitute in substance, if not in form, litigation between the parties, at any rate when it is a "dispute" that is referred and there are parties to it; and, therefore, an advisory opinion when given does, having regard to the certainty of its adoption by the Council, in substance dispose of the matter in issue between the parties;¹ except where it relates to a purely procedural matter as in the Mosul case, namely, whether the action of the Council is to be arbitral or mediatorial. Now, if that is so, we are faced with the fact that in December, 1920, the Assembly deliberately deleted from the Statute of the Court its obligatory jurisdiction (except for those states which elect to adopt Article 36 of the Statute, and then only in accordance with its terms), and in view of that fact it is difficult to believe the true interpretation of the Covenant to be that obligatory jurisdiction has crept in under cover of the Council's power to request an advisory opinion.²

The League is founded on the principle of the independence and legal equality of states except in so far as the terms of the Covenant depart from that principle. Absolute unanimity is the general rule, and the burden of proof is upon those who assert that in any particular instance absolute unanimity is not required. It is a commonplace that treaty provisions which are restrictive of independence or impose obligations must be restrictively construed,³ and I beg leave to doubt the soundness of the view that, as it were by a side wind, states which are Members of the League have thus in substance parted with one of the most cherished rights of a state, namely, not to litigate except by its own free choice. This opinion may be regarded

¹ Note what the Court said in the Eastern Carelia case (Series B, No. 5, at p. 29). "Answering the question would be substantially equivalent to deciding the dispute between the parties." Note also, M. de Lapradelle *arguendo* in the Tunisian and Moroccan Decrees Advisory Opinion, Series C, No. 2, p. 52. "Though on the face of it we are here simply to give you information to enable you to reply to the Council's request for an opinion we have before us . . . what in reality amounts to an arbitration," cited by Manley Hudson, *op. cit.*, p. 341.

The determination of the Court to strip aside the veil and get at the reality is also well illustrated by its attitude upon the questions relating to settlers of German origin in territory ceded by Germany to Poland, Publications of the Permanent Court of International Justice, Series B, No. 6, at pp. 23-4.

² See the view of the British Government as to the Draft Statute of the Court in 1920, cited by Loder in *British Year Book of International Law*, 1921-2, at p. 20.

³ See, for instance, Advisory Opinion, Publications of the Court, Series B, No. 12, at p. 25.

as revealing the cloven hoof of the theory of sovereignty now so unpopular, but that theory cannot be regarded as obsolete. Thus in the Eastern Carelia case we find the Court saying :¹

“ It is well established in international law that no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration or to any other kind of pacific settlement.”

In these circumstances I venture with diffidence to submit the view that the Council must be absolutely unanimous in requesting the Court for an advisory opinion, except when the opinion is not “ substantially equivalent to deciding the dispute between the parties,” but merely relates to the procedure or method to be adopted by the Council in settling the dispute.²

¹ Publications of the Court, Series B, No. 5, at p. 27.

² It might have been thought that a request for an opinion upon a mere abstract “ question ” involving no parties could be made by a simple majority, but the contrary view seems to have prevailed upon the Council in the discussions following upon the Corfu affair (*League of Nations Official Journal*, November, 1923, pp. 1342-50); see above, p. 5.

THE DRAFT CODE OF AMERICAN INTERNATIONAL LAW ¹

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THE publication by the Governing Board of the Pan-American Union of thirty projects of conventions on the International Law of Peace makes it possible for discussion of the subject of codification to take a more concrete form. For we now have a document which we may fairly assume to contain the sort of provisions which would appear in an actual code of International Law, if the purpose of some of the most earnest American advocates of codification should be realized. Detailed criticism would be out of place, since what we have is but a preliminary draft; but a discussion of the main outlines of the scheme and some consideration of the effect that its adoption would be likely to have on international relations may be useful even at this stage. For these draft conventions come to us with large claims. Thus, Mr. Hughes, Secretary of State of the United States, speaking as chairman of the Pan-American Union on March 2, 1925, says: "We have the inspiration and stimulus of this action full of promise for the world. We feel that, thanks to American initiative, we are on the threshold of accomplishment in the most important endeavour of the human race to lift itself out of the savagery of strife into the domain of law breathing the spirit of amity and justice. . . . I believe that this day, with the submission of concrete proposals which take the question of the development of international law out of mere amiable aspiration, marks a definite step in the progress of civilization and the promotion of peace, and for that reason will long be remembered;" and Dr. James Brown Scott, referring to these words in a recent article on the drafts, has written:² "No member of the American Institute of International Law taking part in the preparation of the projects would have dared to use such language. They are, however,

¹ *Codification of American International Law* (Pan-American Union, Washington, 1925).

² *American Journal of International Law*, April, 1925, p. 337.

very grateful to Secretary Hughes for publicly stating what they would like to have accomplished, however far they may have fallen short of the goal which they had before their eyes." We are justified in assuming, therefore, that the inspiration behind these draft projects is the belief that their adoption, or at any rate the adoption of something after the same pattern, would be a real contribution to the firm establishment of peace.

The genesis of the drafts and the degree of official authority which attaches to them may be shortly explained. In 1906 a convention, ratified by fifteen American states, including the United States, established an international commission of jurists charged to prepare "a draft of a code of private international law and one of public international law, regulating the relations between the nations of America." This Commission held one meeting at Rio de Janeiro in 1912, but its work was soon afterwards interrupted by the War. In 1923 it was reorganized by a resolution of the Fifth International Conference of American States held at Santiago; certain committees which it had appointed in 1912 were to be re-established, and the Commission itself was to be convened at Rio some time in 1925. This meeting has been postponed; but meanwhile in January, 1924, the Governing Board of the Pan-American Union, which is the permanent organ of the Conferences and consists of the diplomatic representatives of the American States at Washington, with the Secretary of State of the United States as chairman, had requested the American Institute of International Law to hold a session during 1924, and to submit the results of its deliberations to the International Commission when it should meet. The Institute accordingly met at Lima in December, 1924, gave a general approval to certain draft conventions laid before it by its Executive Committee, and directed them to be transmitted to the Governing Board of the Union. These are the drafts now published. They have not, of course, been officially approved, and their immediate purpose is merely to give the International Commission of Jurists when it meets something to work on; but they have been prepared at the official request of governments, and, as mentioned above, they have received at least a preliminary official welcome from no less a person than the late Secretary of State of the United States. In that lies their real importance.

The scope of the projects is described by Dr. Scott, as Presi-

dent of the American Institute, in transmitting them to the Governing Board of the Union, as "an attempt to state in conventional form the principles of justice expressed in rules of law which should govern the relations of the American Republics in their mutual and pacific intercourse;" and he says the intention was to cover only that portion of the law of peace "which seemed to have direct and immediate application to the American Republics." The subjects range from great matters like the "Fundamental bases of International Law" and "Declaration of the rights and duties of nations," to such useful but minor matters as "Exchange of publications," and "Interchange of professors and students." The interest of some is predominantly American. Thus there is a somewhat curious project which deals with "Rights and duties of nations in territories in dispute on the question of boundaries," recommends the establishment of a *modus vivendi* by agreement, and lays down rules to be followed in default of agreement for preventing collisions between competing sovereignties. Another project deals with the organization of the Pan-American Union as "a permanent organ of conciliation and co-operation between the Republics of the New World;" and another, which is presented without any expression of opinion as to its desirability, proposes a "Pan-American Court of Justice." The latter is adapted from the project of 1920 of the Commission of Jurists at The Hague, but it contains one or two provisions of novel interest. One, which appears to be the only recognition of Canada as an American nation, provides that each contracting Republic shall name a Canadian jurist, and from the names proposed one shall be drawn by lot to be a member of the Court; on the other hand, the other judges are to be appointed directly, one by each Republic. It would be interesting to have the Canadian view of this suggestion. An interesting variation from The Hague project is contained in Article 17, which confers obligatory jurisdiction in the same cases as those proposed in Article 34 of The Hague project, with the unexplained but important omission of "(b) Any question of international law."

The pacific settlement of disputes is dealt with in a project partly based on The Hague Convention. Good offices, mediation, and arbitration are recommended; and it is made obligatory to submit all controversies which it has been impossible to settle through diplomacy or arbitration to a commission of

inquiry, whose finding, however, is not to have the force of an award. A question endangering peace may also be submitted by one party (apparently without the consent of the other) to the Governing Board of the Pan-American Union, which will then act as a council of conciliation; or the parties may agree to submit any question to the Chief Executive of any American Republic or to any person possessing their confidence, who will render an award as a "friendly compositor." Theoretically, war does not appear to be ruled out, but there is a declaration that the use of force against any American Republic is a matter of concern to all, and should be notified to the Union in order that its Governing Board may take such action as it deems advisable; and another project invalidates for the future the title to territory by conquest. Dr. Scott explains that by this provision it was sought to prevent the occurrence of war by depriving the victor of material profit from its prosecution, but this seems rather an over-simplification of the causes that lead to wars. The sanctions contemplated are moral only; "the observance of International Law rests principally upon the honour of the American Republics, under the sanction of public opinion."

What Dr. Scott calls "the threshold of war" is approached in a convention on maritime neutrality, which sets out the rights and duties of neutral states without any serious modification of the law as commonly understood. There are appended, however, to this project *vœux* recommending *inter alia* the abolition of commercial blockade, the inviolability of private property at sea (neither belligerent nor neutral merchant ships are to be confiscated or sunk in any circumstances), and the substitution for the right of search of a visa by the authorities of a ship's port of departure. The preamble has already informed us that "the American Republics are more interested in regulations concerning the peaceful relations of the nations and neutrality than in those concerning war, in the hope that the latter has happily and forever vanished from the American Continent"; so that these provisions for ensuring the comfort and the profits of the neutral trader during other people's wars are perhaps a natural corollary.

One of the most conspicuous characteristics of these projects is the large proportion of them which are devoted to the theory of International Law. Out of thirty projects, seven have the

following titles : Preamble, General Declarations, Declaration of Pan-American unity and co-operation, Fundamental bases of International Law, Nations (i. e. "the elements which enter into the international conception of the nation"), Declaration of rights and duties of nations, Fundamental rights of American Republics. The fourth-named of these projects commences with a recital which is reminiscent of the sub-title which Henry VIII prefixed to his own draft of the Six Articles, "An Act abolishing diversity in opinions" ; it runs thus :

"Whereas it is proper to determine clearly for the future the fundamental bases of International Law, and an end should be put to the uncertainty and the diversity of doctrines heretofore existing on this subject ; therefore, the American Republics have agreed upon the following convention relative to the *Fundamental bases of International Law*."

We know, however, to-day that one of the things that neither a monarch nor an Act of Parliament can do is to abolish diversity of doctrine in religion ; and it seems improbable that an international convention of Republics will be more successful in the realm of political science. Moreover, some of the propositions laid down in these projects are quite as debatable as Henry VIII's theology. For instance, in a section entitled "Elements of General [*sic*] International Law," we are informed that International principles or rules are either *general* or *particular*, and then that the *specific* principles (which are apparently identical with the *particular*) may be (*a*) continental, (*b*) regional, (*c*) particular to a school, (*d*) special, (*e*) national, (*f*) rules of civilization. One would hardly guess that "national rules" (here treated as a subdivision of "international rules") "are rules which each country enacts on matters which International Law accords them the power to establish," or that "rules of Civilization are those which are intended for application only to certain semi-civilized populations."

More serious, however, than this attempt to impose a most inconvenient terminology is the general character of the political philosophy expressed in these projects. The draft "Declaration of rights and duties of nations" reproduces the declaration with the same title adopted in January, 1916, at the first session of the American Institute of International Law, which, says Dr. Scott, "since its adoption by the Institute has made its

way in the world and appears to be regarded as an important and generally accepted restatement of fundamental conceptions." It is to be hoped that Dr. Scott is mistaken. This Declaration is avowedly, and in parts even textually, an adaptation to international life of the Declaration of Independence, which, for all its historic and sentimental importance, "opens with sweeping aphorisms about the natural rights of man at which political science now smiles, and which, as American abolitionists did not fail to point out at a later day, might seem strange when framed for slave-holding communities by a publicist who himself held slaves."¹ In any case, the Declaration of Independence was not a code of law; it was a political manifesto for a particular occasion, published because its authors felt that "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation," and they naturally used the philosophic ideas of their age argumentatively. "Its object," as Madison said, "was to assert, not to discover truths"; and to-day, at any rate, its "self-evident truths" are no longer self-evident, and some of them are not even true.

It is not possible here to enter into a detailed criticism of the doctrine of natural rights, or of the complementary international doctrine of fundamental rights to which this declaration invites us to return. Their historical importance has been very great, and it may be freely admitted that at certain periods of history their influence has been beneficial. The former raised a barrier against the unlimited claims of the sovereign state when such a barrier was urgently needed; the latter denied the rule of mere expediency and claimed a place for the idea of right in international relations. But as political theories, both are philosophically and historically inadequate; and I may perhaps shortly suggest why, as it seems to me, their revival to-day would be peculiarly unfortunate.

States are not logical constructions, but the products of an historical process, of which we can trace the main outlines; and like all historical conceptions, the conception of a state is always changing. We can, for instance, trace the very process by which the so-called fundamental rights of independence and equality came to be regarded as qualities of states; we know

¹ *The United States, an Outline of Political History*, by Goldwin Smith, p. 87—certainly no hostile critic.

that not only these ideas, but the very facts in international relations out of which they spring, are modern, that medieval states were not independent, and that they were not equal to one another either in theory or fact. There can hardly, therefore, be anything fundamental, that is to say anything that is inherent in the very nature of a state as such, in qualities that actually did not belong to states until comparatively recent times. Herein lies the historical untruth of the doctrine. But its practical dangers are even more serious. For in effect it asks us to believe that the form of state of our own day, or as I think it would be truer to say, the form of yesterday, is the perfect embodiment of the state idea, to which the past history of states has been but the prelude; in other words, that a condition of things which is really only a phase, is the final goal of political development. Its implication is that the international legal order, at any rate in its most essential parts, is a closed book, a datum from which we are merely to deduce the consequences; whereas in fact it is a process which can be directed, wisely or foolishly, by human efforts. At the present time it is being directed, and the circumstances of international life make it vitally important that it should be directed, away from the atomistic conception of international relations towards a more coherent and interdependent international society. In any theory which bases International Law on "fundamental rights," international duties are an afterthought; they are dragged in to the picture only because without them, as long as states, all equally endowed with rights, have to live together in the same world, their rights would not otherwise be effective. International duty is practically made to consist in respecting other states' rights, as may be very clearly seen in the draft declaration under consideration in such phrases as the following: "Whereas these fundamental rights create a duty on the part of the peoples of all nations to observe them"; "every nation has the right to independence . . . provided that . . . it does not interfere with or violate the rights of other states"; "every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe." I shall venture to criticize such statements as these in words which were used in the last number of this *Year Book* by the reviewer of Professor C. G. Fenwick's

treatise on International Law : “ International Law to Professor Fenwick consists of my rights, your duties. Is this true ? If it is true, is it the path of progress for International Law ? There seems to be far too little stress laid on the *duties* of a state as a state, and it is a question whether much that seems unsatisfactory and abnormal in world conditions to-day would not fall into better perspective if looked at from the aspect of state duties instead of state rights. The duties of a state are not limited to respect for the rights of other states. Take, as an example, a question such as a régime of capitulations. If attention is concentrated on the rights of a state, its right to jurisdiction and to equality with all other states, any system of extra-territorial jurisdiction within its territory for the benefit of the nationals of another Power is indefensible, but if the problem is considered from the point of view of state duties, from that of the obligation of a state to maintain within its borders a judicial system which shall afford an honest and effective administration of justice to all persons, whether citizens or aliens, the maintenance of a system of capitulations ceases to be unjust and unreasonable so long as that state’s obligation is not fulfilled. . . . It is the backward and the recalcitrant states which really constitute the hindrance to the progress of international law.” These reflections are as relevant to what Dr. Scott twice refers to as “ the enlightened practice ” of the American Republics, as they are to the practice of other continents. Yet the American Republics even have fundamental rights peculiar to themselves, and the separate project in which they are stated is so aptly illustrative of this criticism, that I quote the operative clauses in full :

“ 1. The American Republics, equal before international law, have the rights inherent in complete independence, liberty, and sovereignty. Such rights can in no way be restricted to the profit of another nation, even with the consent of the interested American Republics.¹

2. No American Republic can cede any part whatever of its territory to a non-American nation, even if it consents to do so.

3. No nation shall hereafter, for any reason whatsoever, directly or indirectly, occupy even temporarily any portion of the territory of an American Republic in order to exercise sovereignty therein, even with the consent of the said Republic.

¹ It is, however, reassuring to find from a later project on Treaties that these “ must be executed in good faith and cannot be modified except by an amicable agreement of the parties.”

4. No nation has a right to interfere in the internal or foreign affairs of an American Republic against the will of that Republic. The sole lawful intervention is friendly and conciliatory action without any character of coercion."

It is not necessary to consider how far the existing "enlightened practice" of all American Republics accords with these principles, because the recitals to this project speak, no doubt advisedly, of *extending* the principles to their reciprocal relations. The doctrine of natural rights has always been far more serviceable as a political battle-cry than as an explanation of the constitution of political society, and it may be that that explains its prominence in these projects.

However that may be, and whatever may be its peculiar appropriateness, if it has any, to the relations of the American Republics *inter se*, it is the very last battle-cry that is appropriate to the general international conditions of the world to-day. George III may or may not have been a tyrant, but at any rate the whole object of the Declaration of Independence was to prove that he was. But there is no supernational tyrant in being or in prospect to-day against whom these fulminations can fitly be directed. The truth about international society is exactly the reverse; for there it is the individual members that are over-mighty, and the centripetal forces that are pitifully weak. The battle-cry that we need is not one that proclaims "the complete independence, liberty, and sovereignty" of every state, but one that will teach the need of national sacrifice, and that note is hardly to be heard at all in these projects. The reader who approaches them with a view of asking himself whether they are really likely to "mark a definite step in the progress of civilization and the promotion of peace" can hardly fail to observe the almost complete absence of any provision for regulating the disputes which are probably the most dangerous to peace in modern times, namely, those that have their roots in differences of economic interests. Apart from projects on Freedom of transit, adapted from the Barcelona Convention, and on the Navigation of international rivers, the only project which can be said to fall within this domain is one on Immigration, the terms of which are so significant that they deserve to be quoted in full. It runs as follows:

"Whereas: (1) Immigration is a factor of vital importance to the Republics of the American Continent, since it contributes to the growth of population;

(2) This matter must therefore be regulated ;

The American Republics have agreed to conclude the following Convention :

Sole Article.

“ Every Republic may determine, taking into consideration its local conditions, what persons or class of persons it shall permit to enter its territory, and to whom it may eventually and at its discretion concede nationality.”

Now no person who is not blind to the conditions of world politics as they actually are would be foolish enough to expect that what this project calls the problem of immigration is likely to be dealt with in the near future otherwise than in the purely egoistic temper in which it is dealt with here ; it will not be dealt with in the “ international mind ” which another of these projects advocates until nations have begun to realize that the same economic facts which create a problem of immigration for one create a problem of emigration for another, and that this also is “ a factor of vital importance.” That time has not yet come, but until it does, is it really worth while to propose a conventional regulation of the matter at all ? Certainly no such convention as is here proposed is going to remove this subject from the list of those which loom on the distant horizon as threats to future peace.

One of the dangers of the codification movement, not a danger that need be attached to it, but one that is encouraged by the form that the movement has so often taken and that it takes in these projects, is its tendency to present the problem of peace as so much simpler than it really is. Anything that encourages the nations to believe that peace is primarily a matter for lawyers and drafting, and that if sacrifices are involved at all, they will not be needed from ourselves but only from those whom we call upon to respect the rights which our own “ enlightened practice ” justifies (us) in claiming, is a positive hindrance. “ A definite step in the progress of civilization and the promotion of peace ” will only be taken by way of a code of International Law when that code is one that the nations enter into for the purpose of recognizing not only the rights, but also the reasonable interests of other nations, rather than for that of proclaiming their own “ complete independence, liberty, and sovereignty.” But the day of such a code is not yet in sight either on this or on the other side of the Atlantic.

SOVEREIGNTY, SEISIN, AND THE LEAGUE

By Sir JOHN FISCHER WILLIAMS, C.B.E., K.C.

THE Commission of Three appointed in September, 1924, by the Council of the League of Nations "with a view to collecting facts and data which it (the Council) required to fulfil the mission entrusted to it under article 3 (2) of the Treaty of Lausanne," and instructed to "lay before the Council all information and all suggestions which may be of a nature to assist in reaching a decision,"¹ expressed at the end of its very valuable and thorough report certain legal views. "The territory," say the Commissioners, "occupied by the British and Iraq authorities still belongs in law to Turkey until she renounces her rights."² "It is indisputable that Turkey retains her legal sovereignty over the disputed territory so long as she does not renounce her rights. Iraq has no legal right *or* right of conquest over that territory,"³ and again, "The Commission is of opinion that from the legal point of view the disputed territory must be regarded as an integral part of Turkey until that Power renounces her rights. Iraq cannot claim the disputed territory either by invoking the right of conquest or any *other*⁴ legal right."

The fact that the Commissioners were not invited by the Council themselves to make declarations of authority on matters of international law is no reason for treating these declarations lightly. They are at any rate declarations of men entrusted by the League of Nations with a highly delicate and responsible task and, therefore, of high international standing: the views which they express, even if not in and by themselves authoritative, are at any rate evidence of opinions held in circles whose opinions count.

The question of Mosul being now, let us hope, settled satisfactorily, it may be useful to consider these propositions of law as far as possible in a dry light and without special reference to the circumstances in which they were laid down. For they are propositions of no little importance, and they go to the root of international law. The submission of this paper is that, attractive

¹ League of Nations, C. 400, M. 147, 1925, VII.

² *Ibid.*, p. 84.

³ *Ibid.*, p. 85.

⁴ Italics the writer's.

as these propositions are, at first sight, to one who believes that the rule of law has increased, is increasing, and ought, so far from being diminished, to become universal, they rest on a false conception of what may be called the theory of international property in international law as it now exists ; and an uncritical acceptance of their doctrine may lead to an under-estimate of the importance of the principles contained in Article 10 of the Covenant of the League of Nations.

The central proposition of international law affirmed by the Commissioners appears to be that "*a district of which a state has lost actual possession remains in international law an integral part of the territory of that state and subject to that state's 'legal sovereignty' until that state renounces its rights.*" Whether an exception to this rule should be made in the case of conquest, the Commissioners appear to be in doubt. On one page they treat the right of conquest as a species of legal right ("conquest or any *other* legal right"), while on another they contrast the right of conquest with legal right ("Legal right or right of conquest").¹ But it is difficult to see what foundation there can be for the doubt, or why, if consent is necessary in the one case, it is not also required in the other. True it is that in the vast majority of cases when a territory is occupied permanently without the consent of the Power which previously there possessed dominion, the occupation is a direct conquest in the ordinary sense of a subjugation of physical opposition, but equally in other cases of such an occupation it is the physical weakness of the evicted Power and preponderance of force on the side of the occupying Power which are the causes of the occupation. In each class of case the occupation is the result of force. There can be no good reason for making a distinction in legal theory between the results of a forcible operation carried through against active resistance—which is the usual case of conquest—and the results of an occupation carried through without fighting, and in consequence of the inability of the dispossessed Power to contest the force that is at the disposal of the occupying Power or ready to support its pretensions. Of this latter class

¹ With this language of the Commissioners, an English lawyer may compare the more cautious expressions of the Judicial Committee of the Privy Council in the case of the *Gerasimo*, 11 Moore, P.C., at p. 96 : "Is it necessary that, either by cession or conquest or some other means, it (the territory in question) should either permanently or temporarily be incorporated with and form part of the dominions of the invader."

there are several examples in history. It was, for example, in this way that Belgium acquired in the first instance her independence, Holland being in substance compelled to abstain from the use of force by the intervention of the Great Powers. If then the consent of the dispossessed Power is needed to legitimize acquisition in the latter class of case, it is equally necessary in the ordinary case of direct conquest.

The proposition of the Commissioners is far from being merely academic. Circumstances are conceivable in which this question might raise issues of great practical importance. A state cannot exist without a territory. On an application for the admission of a state to the League of Nations, one of the questions asked by the League is whether the state has settled frontiers. Suppose that the state seeking admission is in the situation in which the revolted Spanish colonies in South America were in 1824—in *de facto* definitive occupation of territory, recognized as states by Great Britain and the United States, but not yet recognized by Spain. Or suppose that the state is in the position of Roumania, whose dominion in Bessarabia has been recognized by the general body of states but not by Russia. If the doctrine of the necessity of the assent of the outgoing state is to be maintained, we must say either (1) that the League must neglect the doctrines of international law, or (2) that those doctrines have no more meaning than the statement in the mouth of a modern English conveyancer that the "legal estate is outstanding in J.S.", or (3) that the applicants are inadmissible for Membership. But that the League should defy international law is unthinkable, that a proposition of international law should be reduced to mere formalism is destructive of the whole science, and that applicants for Membership of the League who are in such a condition should be inadmissible is a patent absurdity. It would substitute the decision of a single Power for a decision of the League.

The question at issue is then—whether in international law as it now exists, a good title is acquired to territory by actual occupation, based on force, without the consent of the Power dispossessed or whether the consent of that Power is needed to perfect the title of the occupier?

And first let us observe that in one set of cases at any rate—those in which the whole of the territory of the dispossessed state is occupied permanently—no question of consent of the

dispossessed Power arises. A Power which has no effective control of territory is no longer a Power. If, therefore, the rule asserted in the Report in the Mosul case is a rule of law, it is a rule of only partial application. And it fails to apply in those very cases where force has been carried to the last extremity, and where, therefore, *a priori* one would have expected that an appeal to law would have been admissible. It would be a strange law that would give to the author of a homicide advantages which it denies to a mere highway robber.

Next, let me mention, only to put aside, the case of hostile occupation during war time. So long as such an occupation is treated by the occupying Power as merely an occupation and no claim to definite ownership or "sovereignty" is put forward, the problem which we are considering does not arise. The occupying Power has its own sphere—more or less definite—of authority; the Power whose territory is occupied retains authority outside that sphere. The occupying Power is, no doubt, as "legitimate" within its own sphere as is the Power which suffers the occupation.¹ But the occupying Power is not claiming to be fully "sovereign" unless and until it proclaims annexation.

To come now to the actual proposition which we have to consider :

What is the meaning of the statement that "in international law" a territory not physically possessed by a state or by an authority derived from that state—e. g. by lease, concession, or temporary delegation (as in the Saar Valley)—is "an integral part of the territory" of that state "and subject to that state's

¹ A misunderstanding on this head might arise from a hasty reading of the English version of Article 43 of *The Hague Convention on the Laws and Customs of War on Land*, which speaks of "the authority of the *legitimate power* having actually passed into the hands of the occupant." The French text has "*pouvoir légal*" for legitimate power. But it is dangerously easy to read in the English text "legitimate Power" ("*Puissance légitime*")—an error to which a passage in Oppenheim, *International Law*, Vol. II, "War," § 169, where the author speaks of the "legitimate Government" in contra-distinction to "the occupant," might seem to lend authority. Possibly "legal" would have been a better translation of the French, and have better given the real meaning of the article, which surely is that, as the occupant alone has the power to enforce the law, it is his duty to keep order and maintain the laws as he finds them. Thus amended, the whole passage runs: "The authority of the legal power (*pouvoir légal*) having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

From merely internal evidence one would say that this sentence was not drafted by an English-speaking person.

legal sovereignty ? ” Obviously the assertion is that the fact of possession is in conflict with “international law.” But it can hardly be meant that the occupation produces no legal consequences. The action of the Elector of Hesse-Cassel, who on his restoration after the Napoleonic wars treated or sought to treat as invalid alienations of his private domains made under the Napoleonic Kingdom of Westphalia, has not earned universal approval¹—and even the Elector cannot have gone to the length of extending this view to all legal things done in his absence. Such a view would be inconsistent with the primary duty of the law to keep the peace. Our ancestors had saner ideas of the consequences of the actual occupation of territory—an English lawyer thinks naturally of seisin—and one title to our gratitude of the most wary and possibly the most wise of English monarchs was his recognition of the necessity for extending such a rule of peace even to the apices—the almost unconquerable highlands—of the law of treason. It was a statute of Henry VII which laid down—or has been treated as laying down—the rule that service to the actual wearer of the Crown is not treason to the dispossessed lawful claimant.²

The proposition of the Commissioners suffers by a too facile use—even if respectable authority be vouched to support it—of the much-abused word “sovereignty.” Turkey retains her “legal sovereignty over the disputed territory.” What in this connexion is meant by “sovereignty” ? We are here not concerned with “sovereignty”—imperium—in its true sense, the sense in which it denotes a relation of person to person,³ not the relation of a person to a thing, the sense in which it was used, for example, by Sir Henry Maine when he spoke⁴ of the “theory of sovereignty—or (in other words) of a *portion in each community*⁵ possessing unlimited coercive force over the rest.” And it is in the same sense that the cognate word “supreme” is used in a famous instrument: His Majesty the King is, according to the Bidding Prayer, “over all persons in all causes as well ecclesiastical as temporal throughout his dominions

¹ See Hall, *International Law*, 7th ed., p. 608.

² 2 Henry VII, c. I. See Holdsworth, *History of English Law*, 3rd ed., Vol. III, p. 468, and Vol. IV, p. 500.

³ Regum timendorum in proprios greges
Reges in ipsos imperium est Jovis.

⁴ *Early History of Institutions* (London, 1875), p. 87.

⁵ Italics the writer's.

supreme”¹—a passage which well marks that sovereignty is a personal relation in a geographical sphere. On the contrary, in our present discussion of the dicta of the Commissioners we are dealing with “sovereignty” in a secondary, I had almost ventured to say, a less proper sense—of the authority of a state over territory, and we are regarding this authority in its external aspect—i. e. in the relationship between states, where it is analogous to ownership, or rather, as will appear later, to possession, in the relationships of individuals in municipal law.²

If “sovereignty” were to be understood in its strict and original sense, the proposition of the Commissioners would mean that in international law the acts of authority by the state in possession are invalid in the district concerned, and equally acts of authority by the state possessing “legal sovereignty” are valid. On this view international and municipal law would in that particular district be in conflict. If a Court of the Power in possession sentenced by due legal process an inhabitant to death, then, in the view of international law, the sentence would be a nullity and the Power in possession be responsible to the dispossessed Power as for a murder. Consequences so absurd need only be stated to show that the premisses are erroneous. It cannot be a rule of a sane international law that an effective sovereignty is for internal purposes—i. e. in the relation between sovereign and subject—illegal.

The word “sovereignty” as used by the Commissioners must then be taken simply to mean that kind of ownership, possession, or domain (*dominium*) which a state in its international relations possesses over territory. The proposition of the Commissioners, thus understood and purged of the intrusive conception of

¹ An exile. I quote from a friend’s memory.

² I do not by this use of language mean to obscure the distinction between ownership and dominion, or “eminent domain,” as a matter of municipal public law. But if a district is in dispute between Blackland and Whiteland, the question whether in each of those communities land is owned individually or communally is irrelevant. The contest between the states, regarded as a matter of inter-state relationship, is rather which is to be the owner or possessor of the territory than which state is to exercise authority there. The quality and extent of the authority to be exercised is not relevant to the dispute, though doubtless whichever state is successful will have in fact the power of disposing completely of the district and all that is therein even if it be necessary for it to amend its municipal law (including its constitution) in order to do so. “Sovereignty,” on the other hand, is not an appropriate term for the mutual relations of states. States are not sovereign in relation to one another—unless one state is to some extent subordinate; they are independent.

“sovereignty,” cannot mean more than that a Court administering international law would in a litigation between the occupying and dispossessed states adjudge the territory in dispute to the state dispossessed unless and until it has assented to the transfer. The dispossessed state has, in fact, a better claim to the international title than the actual occupier. It has, if not a *jus in re*, at any rate a *jus ad rem*. The question is whether even in this sense it is possible to accept the proposition of the Commissioners. For the Commissioners the essential condition of the transfer of dominion is the assent of the dispossessed state; without that assent there is no legal transfer, with that assent, presumably, a transfer is legal. I would rather say that while the assent of the dispossessed state in most cases settles the problem whether in the view of international law there has been a valid transfer of dominion, this assent is not the only condition of which it is necessary to take account. You may have transfers which are valid even though the Power dispossessed has not assented: you may—though this is a more remote possibility—have transfers which are not yet valid even though the Power dispossessed has given its assent.

The case, already referred to, of the revolted Spanish colonies may serve to bring the formula of the Commissioners to an historical test.

By 1818 the revolt against Spain of her former American colonies had so far progressed that some at least of the insurgent dominions were organized as political states. In 1822 the United States recognized the independence of the Colonies; at the end of 1824 Great Britain followed suit. But Spain—the outgoing Power—“kept up the pretence of prosecuting the war down to 1830,” and the new states only “severally received” the recognition of Spain “in the course of the following five-and-twenty years.”¹ To say that until these successive recognitions were received the South American states were in international law an integral part of the Spanish dominions is to sever all relation between international law and contemporary fact, and takes us straight back to those theories which under cover of the “law of nature” made of international law a branch not of law but of morality.

Or, if it be thought that there is something peculiar in a case where the state in possession of the disputed territory has no

¹ *Cambridge Modern History*, Vol. X, p. 309.

existence apart from that territory, let the case of Bessarabia at the present day be considered. Russia has never given her consent to Roumanian "sovereignty" in Bessarabia. But the Principal Allied and Associated Powers have recognized Roumania's title to Bessarabia by the treaty of October 28, 1920. Was this recognition the recognition of an illegality?

If it be said that the doctrine of "relation back" supplies a way out of these difficulties, that the assent of the outgoing state when given must be understood—whatever may be its language—as referring back to the date when the possession of the incoming state became effective, the answer is that there is no sufficient reason for this introduction of what is in truth a fiction into international affairs. *Ex post facto* legislation is to be avoided, though it is an inconvenience to which in domestic matters a state may have occasionally to submit as a result of the exercise of the legislative authority of a legally competent body, such as the British Parliament. But the doctrine that in international law it is open to one state in its uncontrolled discretion to change *ex post facto* the legal situation of the whole or part of the territory of another—and therefore in some cases to give it its very international existence—is surely self-condemned.

It follows that the consent of the dispossessed state is not a condition *sine qua non* of a valid transfer of territory.

Equally the proposition that such consent *ipso facto* and by itself alone makes a transfer valid is unacceptable. If that were so, an alienation of territory by a state which has given pledges not to alienate—e. g. an alienation by present Austria of so much of her territory as would reduce her to the position of Monaco or Andorra—would be valid immediately upon its accomplishment.

What shall we say then? We must first of all and always bear in mind certain fundamental conditions of international law and international relationship. We must beware of facile analogies of contemporary private law. It is tempting to say that just as in private law (though this proposition, even apart from the operation of the Statutes of Limitation, is not universally true) an owner of land, if his title is to be extinguished, must execute a deed of conveyance or otherwise supply some evidence of consent or acquiescence, so must it be in international law for the alienation of territory by a state. But the science of

international law does not consist in the application to international matters of propositions of contemporary private law on which the municipal jurisprudence of civilized countries is in general agreement. The law of international dominion—or perhaps it would be better to say international “seisin”—is not the land law of any one civilized country or a quintessence of the land laws of all civilized countries. Nor is there such a thing as an International Land Registry where transfers of territory can be enrolled. Nor—may it be permitted to one who has spent many years in Lincoln’s Inn to add—has international law ever developed the doctrine, even though certain articles of the Covenant of the League seem to be the starting-point of an international theory of trusts, of a “legal estate” as distinguished from “equitable”—by which in modern conditions is meant “effective”—ownership.

To attach this predominant importance in international law to the consent of the dispossessed state is to import an idea of contemporary private law into circumstances in which the conditions of validity are wholly different. In private law the only consent which is material is consent freely given: consent under duress gives no complete title to a person party or privy to the duress. But this is not so in international law. In that law duress does not invalidate consent—a fact which is evidence of the primitive nature of international law. But if it were otherwise, what would become of the “sanctity of treaties”? To require, therefore, in international law, by analogy—even if imperfect—to private law, consent as the one decisive factor for the validity of a cession, is to lose sight of the fact that in private law consent has its importance only as a free manifestation of the will; if that freedom is wanting, consent, as the word is used in private law, is wanting also. To exact a consent in international law is, therefore, often nothing more than to insist on an act which is not the indication of a free will (I write as a lawyer, not as a philosopher).

Again: to attach cardinal importance to the consent of the Power dispossessed is to neglect the communal quality which international law shares with all law. Law exists only in a community; it consists of the rules which, according to the general sense of the community expressed through its machinery of government, whether democratic, despotic, or otherwise, ought to be enforced. Now to say that on a disputed question of

territory the one thing that is decisive is the expressed will of one of the disputants is not to give a legal solution ; it is to tie the law to the arbitrary decision of that disputant, to submit the will of the community to the sole will of that member of the community—or rather to the existence of certain facts which are assumed, often untruly, to be decisive evidence of the existence of that will. Even in private law—from which this insistence on consent is apparently borrowed—such is not the universal rule. A man's land may be taken from him without his consent, in the general interest of the community.

This communal aspect may be expressed in various ways : the ceding state may have engaged itself to other states not to make the cession, just as Austria—as we have already noticed—has engaged herself by the Treaty of St. Germain not to alienate so much of her territory as to lose her independence. Or even without any such engagement, the general interest that no state should acquire a preponderance of power may be a weight in the scale. Or the general interest of the international community in the preservation of peace may impose a decision, as happened in the days of the European Concert, at any rate when the Powers concerned were smaller Powers. In such cases, indeed, diplomacy was the forerunner of law ; our fathers had to grope towards that recognition of the general interest of all human beings in international matters of which the document to which has been given the legal name of the “ Covenant ” of the League is the most recent expression.

Nor must we forget that there is a certain artificiality which may result from too rigid an insistence on the general principle that international law is concerned solely with states and not with individuals. Formally, no doubt, this is true, and in the actual practice of international intercourse the rule is of importance. The Permanent Court of International Justice knows no litigants that are not states. But the rule is on a broad view in essence procedural. States are a method of grouping and regulating human beings, and they derive their importance and vitality from the human beings so regulated and grouped. To attach paramount importance in the question of the international ownership to the signature of the dispossessed state is to neglect the human side of the question ; the signature may have no relation to the wishes of the populations concerned. To these wishes, if an international tribunal has to decide to whom

a territory is to be awarded, some weight, at any rate, must be given, not perhaps necessarily a decisive weight to the neglect of all other considerations, but *some* weight.

If indeed we ask, not what is in fact the basis on which the actual international ownership of territory rests, but what are the considerations by which an international tribunal would normally be guided if called on to decide the fate of a territory, we shall find, perhaps, the most authoritative statement of those considerations in the recitals to the treaty, already referred to, signed at Paris on October 28, 1920, between the Principal Allied Powers on the one hand, and Roumania on the other, for regulating the destinies of Bessarabia. Those recitals run :

“Whereas in the interests of general peace in Europe it is of importance to assure henceforth a sovereignty over Bessarabia in accordance with the aspirations of the population, and guaranteeing to its racial, religious, and linguistic minorities the protection which is due to them ;

“Whereas from geographic, ethnographic, historic, and economic points of view, the reunion of Bessarabia to Roumania is fully justified ;

“Whereas the population of Bessarabia has given proof of its desire to see Bessarabia reunited to Roumania ;

“In fine, whereas Roumania, of her own free will, desires to give positive guarantees of liberty and justice to the inhabitants of the former Kingdom of Roumania, and also to those of the territories newly transferred, irrespective of race, religion, or language, in conformity with the Treaty signed at Paris on the 9th December, 1919.”

Thus the reasons given are (1) the interests of the general peace of Europe, (2) geographical, ethnographical, historical, and economic considerations, (3) proof given that the population desired the actual settlement made, and lastly (4) the desire of Roumania to guarantee good government generally and, in particular, protection of racial, religious, and linguistic minorities. All these reasons combined are considered to justify the Principal Allied Powers in recognizing Roumanian authority over Bessarabia, in despite of the fact that Russia has not given her assent to the transfer of territory. But what the Allied Powers do is to recognize a possession already effectively taken, not in any sense to recognize that, had no such possession been taken, there would have been anything in the nature of an international duty to aid Roumania in acquiring the territory. In any case, the propriety of recognition is not made to depend on the question whether the Power dispossessed has assented.

The assertion that the consent of the dispossessed state is

required to validate a transfer of territory may, however, be based not so much on the analogy of private law as on the general proposition that the mere exercise of force is in and by itself unjust, and cannot be the origin of a good title.¹ Such a general proposition is, however, not a legal proposition at all if international law is a body of positive doctrine, but a moral proposition. To say that force cannot give a good legal title is to divorce international law from the actual practice of nations in all known periods of history. To assert such propositions as being in fact law, and not as being rules which their authors would like to see become law, is to bring the whole science of international law into disrepute with those who have to manage the affairs of the world.

If indeed we see things as they are and then look back to past stages of our own English law, we may find an analogy and an encouragement. International law may profitably be compared with English real property law in the twelfth century.² One great object of that law, in so far as the administration and development was inspired from the monarchy, was the maintenance of the King's peace and the extension of the King's authority. It, therefore, gave a special status to actual independent physical possession (or seisin) however acquired, once it had a scintilla—say four days—of permanence. The wrongdoer who had a tortious seisin had nevertheless, as a result of the higher duty of preserving the peace, the right to legal protection under that Statute which, we are told, had cost our Henry II some sleepless nights—the Assize of Novel Disseisin; the King has to discourage self-help, and he based his law on the paramount importance of peace. Even so, international law, in not dissimilar conditions, in an unruly state of society, has consecrated definitive possession and, for states bound by the Covenant of the League, has given that consecration expression in the first and commanding sentence of Article 10 of that instrument.³ True,

¹ See Fauchille, *Traité de Droit International Public*, Tome 1^{er}, 2^{me} Partie, Paix, § 557, where the different authorities are cited.

² See Maitland's *The Mystery of Seizin and the Beatitude of Seizin*, Collected Papers, Vol. I, pp. 368 and 407; Holdsworth, *History of English Law*, 3rd ed., Vol. III, pp. 9–14 and 90 *et seq.*; Pollock and Maitland, *History of English Law*, Vol. II, Ch. IV, § 2. For the later law, Holdsworth, Vol. VII, p. 23 *et seq.* The twelfth-century law was free from the later refinements—seisin in law and so forth—which came to trouble the early simplicity of the doctrine.

³ “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”

there is between the old English law with its protection of seisin and international law with its recognition of actual possession this great difference, that in the English law there existed a legal remedy—difficult indeed, slow and expensive, but still a remedy—for the disseised possessor, while international law has as yet no rules other than the rule of definitive possession for determining contested cases of international dominion,¹ and no one central authority prepared to carry into effect any such rules as may be settled. But the essential likeness is more fundamental than the points of dissimilarity. Neither law is concerned with ownership as distinct from possession, and neither law in fact knows the absolute owner. Both laws bear hard upon the disseisee, both laws give legal effect—under conditions and not by way of prescription only—to all possession whether or not in its origin it was tortious, being based on a dispossession, a disseisin.²

Similar evils call for and beget similar remedies. The Covenant of the League with its Article 10, seeks to give international society that stability of possession which Henry II sought to give to twelfth-century England. It is true that the Assize of Novel Disseisin gave a possessory remedy only; the question of the ultimate better right, as between the contending parties to seisin or possession remained always to be tried out, if necessary, in an action begun by writ of right, while in international matters there is no writ of right, and the Covenant is, therefore, both more rapid and more permanent in its effects, as it converts at once a present seisin into something more like ownership. And the Covenant does this for the excellent reason that in international matters the only process that corresponds to the writ of right is war—and the correspondence is not so very remote when it is remembered that an action begun by writ of right might be decided by trial by battle. So Article 10 of the Covenant is, as it were, an international Assize of Novel Disseisin introduced into a society where there are no actions for the

¹ In cases where the internationally disputed title turned on questions of discovery or settlement, rules of definitive possession were worked out with some approach to thoroughness. But the age of discovery is now over.

² Thus Pollock and Maitland, *op. cit.* "Seisin, we may say, generates a title to land" (p. 46), and "in Bracton's day this assize (the assize of novel disseisin) protects a thoroughly wrongful, untitled, and vicious possession." So in later law, although "disseisin is a putting of a man out of seisin and even implieth a wrong" (*Coke upon Littleton*, 153 b), nevertheless, a disseisor might acquire a legal fee and hold of the lord, as the disseisee did.

recovery of land other than trial by battle. In both cases, the problem was how to deal with a primitive society : in the one case, the civil society of medieval England, in the other, the international relationships on this planet in the twentieth century. Both these societies possessed few and imperfect general conceptions of law, and to them law tends to present itself rather as a matter of rules, mainly procedural, for settling disputes, than as the permanent statutory framework of daily life.

In such conditions, the essential thing and the main pre-occupation, is to preserve the peace. To do this your Assize and your Covenant must start with things as you find them. The "territorial integrity and existing political independence" of all Members of the League is to be respected and preserved "as against external aggression." What is this "territorial integrity?" An imaginary integrity defined by a jurist or a moralist? Assuredly not. What is meant is the existing territorial integrity, however acquired—twin brother of "existing political independence": the actual seisin. It is not open to a Member of the League, bound by the Covenant, to refuse to protect, in whatever way he judges most effective and possible for himself, the territorial integrity of a fellow-Member, on the ground that existing territorial arrangements are based on a moral or legal wrong, and that, therefore, an attempt by force, by a "forcible entry," to amend or alter the frontier is not "aggression." If this course were open to Members of the League, Article 10 would be valueless. In the many discussions on that article, such a suggestion seems never to have been made. It is the actual definitive territorial *status quo* which is protected. "Forcible entry" is a wrongful aggression, whatever reasons be given to show that the title of the tenant in possession is defective, that his seisin is based on an ancient disseisin. In a primitive society, such as in the international society of the present day, possession must be protected, even the possession of a disseisor. In such societies there is no room for the conception of ownership distinct from seisin.

If this is right, international law, while resembling English law, does not follow Roman jurisprudence. For English law what is important in tracing the title to land is that possession or seisin which is older in origin, and, therefore, better, than that of any known claimant; ownership is not a new conception

different from seisin. Roman law, on the other hand, representing the mature product of a long elaborated and regulated civilization—"regarded *dominium* and *possessio* as quite distinct conceptions. *Dominium* denoted primarily a right, and might or might not connote the fact of physical control. *Possessio* denoted primarily the fact of physical control. It had, as such, no legal consequences, and was therefore totally distinct from *dominium*."¹ If the Commission of Three had said that the "dominium" of disputed territory, in the sense of a right of property rather than of "sovereignty," remained in the original owner until transferred, they would apparently have been making a direct application to international affairs of the conceptions of Roman private law, but they would nevertheless have been far removed from the true theory of international jurisprudence.

Thus we get in international law the same result as to the international title to territory as we have in English law as to the title to land. True it is that in English law the effects of seisin have been reinforced by Statutes of Limitation. Those Statutes do not affect the character of the title of the person seised, in itself, but destroy the remedy or the right—as the case may be—of an adverse claimant.² In international law the effect of a Statute of Limitation supervenes when possession can reasonably be said to be definitive; in our law of real property the event takes place at whatever period the appropriate Statute has determined.

Indeed no society, whether national or international, can exist without the healing influence of a Statute, or the equivalent of a Statute, of Limitations. At some point or other, whether it be the date of the coronation of Richard I, or some definite period of years before the present date, or the date when the Covenant of the League came into force, a halt must be called

¹ Holdsworth, *History of English Law*, Vol. VII, p. 459.

² See the judgment of Cozens-Hardy, M.R., in *Atkinson and Horsell's Contract*, 1912, 2 Ch., p. 9, cited in Holdsworth, *History of English Law*, Vol. III, p. 94: "My present view is that . . . the true view is this, that whenever you find a person in possession of property, that possession is *prima facie* evidence of ownership in fee, and that *prima facie* evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of § 34 of the Real Property Limitation Act, and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is no one who can challenge the presumption which his possession of the property gives."

to the zeal of litigants and the pertinacity of their advisers, and even if you begin by making of length of possession a mere shield for a defendant, you end by giving to it an acquisitive force, and making it the foundation of a plaintiff's claim.

We reach then the conclusion that the existing rule may be stated to be simply that the international right of one state to exclude other states from any given territory—the right which is sometimes called “territorial sovereignty”—is analogous to “seisin,” is acquired by definitive possession, and lost when that possession is lost.

The facts of past and contemporary history give us, as the rule of positive international law, that definitive possession is the one deciding factor in the problem of international title to territory. The question for the international lawyer in any given case is not whether an actual possession has a morally just origin; war or the use or threat or fear of force, whether just or unjust, produces international results of equal legal validity; the question is rather whether the facts justify the claim of the occupying state that its possession is to be regarded as definitive. Apart from the Covenant of the League, if one country makes an unjust war upon another and seizes a part of that other's territory—whether by force or fraud—it is open to us as moralists to deplore the behaviour of the aggressor, we may even go so far as to say that they have no “right” to the territory which they have seized, that it ought not to form part of their dominions, but if the seizure is definitive, if, that is to say, it may be regarded as stable and permanent, we have as international lawyers no alternative but to regard the territory as lost to the country attacked, and forming part of the dominions of the aggressor. If, on the other hand, the Covenant applies, definitive possession gives a title to the protection of the League.

Whether a possession in any particular case is definitive, is a question of fact, to be decided like other questions of fact by the Aristotelian man of common sense, the ideal juryman; possession by an occupying army in time of war is not definitive so long as the war lasts, and is usually in modern times not claimed as such, though there are instances to the contrary.¹ Very good evidence that possession has changed definitively is an admission to that effect by the dispossessed Power, as, for

¹ See Fauchille, *op. cit.*

example, by treaty ;¹ but such an admission is not necessary to the validity of the change, nor is it always conclusive. For the dispossessed Power may have been bound by treaty with a third Power not to assent to the dispossession, and in that case the dispossession cannot be said to be definitive until it is seen what action—if any—is taken by the third Power. Recognition by other Powers of the new seisin has in the past been good evidence that there has been a definitive change, but such recognition has often been delayed until long after the change has been definitive. Moreover, except in cases where a new state has come into being and seeks recognition in the community of states, a long period may elapse before any given Power is called upon to take any step implying a recognition of a transfer of territory.

Where the Covenant applies, any direct attempt to encroach on the territorial integrity of a Member of the League is met by Article 10, but it must not be forgotten that under the Covenant, war is still a possibility, and it is even possible that at the end of such a war one belligerent may be found to be claiming to be in definitive possession, possibly with the assent of the resident population, of the territory of the other. In such an event the existing rules may at any rate have this value, that they will be useful as guides for any action that may be contemplated by the League, and if and in so far as the League takes no action, it is those rules which will prevail.

In support of the general argument, let me give a rough translation of a few sentences from the work on State Succession² of the present President of the Permanent Court of International Justice :

“ Possession, in international law, is the exercise of power in and from a territory. The territory of a state is that of which it can take physical possession. Whoever succeeds in obtaining this possession has sovereignty (*Herrschaft*) over everything that is in the territory.

“ When one state follows after another on the same territory there is a change in the exercise of power. The change may be the result of the concurrent wills of both the states concerned, but nevertheless the consent of the state dispossessed is, in law, a matter of indifference ; the only relevant fact is that one state comes after the other on the territory. It is this fact alone which

¹ Cf. the decision of the Common Law as to the possession of chattels : “ Delivery is favourably construed ; taking is put to strict proof ” (*Pollock and Wright on Possession*, Oxford, 1888, p. 14).

² *Die Staatensuccession*, Max Huber, Leipzig, 1898.

at once gives to the new state all rights and duties which arise out of the succession ; the consent of the predecessor is unnecessary. *This indeed, is a mark of the primitive character of international law.*¹ Even when in the case of a partial conquest a treaty of cession puts an end to the provisional situation and establishes a final and legal status, this does not mean that no right has been acquired before the date of the treaty ; the treaty is only the recognition by the losing party—a recognition which may never be given or, at any rate, not until after a long period, as in the case of Belgium.”

The lapse of a quarter of a century has in no way affected the truth of these words though the existence of the League has modified the conditions of their application. International law is still primitive ; we do the world no service if we seek to deny it. Conquest is often, though not always, a moral wrong. But it is not illegal and it produces legal results. We shall not advance the cause of peace and international order by seeking to deny that war produces results—such as the acquisition of territory—which it does in fact produce. If we want to stop the forcible acquisition of territory, we must stop private war. An effective prohibition of forcible entry—as by a rigorously enforced Article 10 of the Covenant—will prevent a case of disseisin arising. But disseisin, once it happens, produces legal results, and we have at present no rules for the trial of an international action originated by a “ writ of right.”

The temptation to idealize international law, to make out that its contents approach more nearly to perfect justice than is in fact the case, is one of the most powerful that assail the international lawyer. Aggressive wars, wars of conquest, are felt to be contrary to general moral conceptions, and there is therefore, a strong tendency to say that they do not produce the effects which in fact they do produce. This tendency seems to the writer to be fallacious, and to be a possible cause of no little evil. It is easy to persuade oneself that an action of which one disapproves ought not in law to produce advantages to the actor, and thus, making the wish the father to the thought, to satisfy our consciences by laying down, so far as is in our power, that the law is what we should like it to be. This is an easy way of attacking the evil of war, it costs little thought, less treasure, and no blood. But a law so constructed has the capital disadvantage that it is not in accordance with international practice, and its ghostly substance vanishes at the first ray of

¹ Italics the present writer's.

the sun of reality. If aggressive war—and therefore ultimately all war of every kind—is to be abolished, two things are necessary ; first, international society must be so organized that aggression will be repressed by the police force—however constituted—of society ; second, some method must be devised for giving satisfaction to the demands for change which are inevitable in every living organism. But we shall do nothing—except administer a little opium to our mental and moral vigour—by saying that war and conquest, while we allow them to take place, produce results which are invalid in law. For this is merely in the name of morality to unsettle the foundations of international society and to increase the chances of the perpetuation of that anarchy out of which the human race now seeks to struggle.

VISIT, SEARCH, AND DETENTION

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NAVAL operations in time of war against merchant ships, whether enemy or neutral, have for centuries involved a claim on the part of belligerent warships to visit and search such ships before capture. It is not a substantive and independent right, it is a means justified by the end. Belligerents have a full and perfect right to capture enemy ships and goods and articles going to their enemy which are of assistance to them in time of war. To the exercise of that right the right of search is essential. "It has been truly denominated a right growing out of and ancillary to the greater right of capture."¹ The right of visit and search is "so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture."² The belligerent warship has both a right and a duty in this matter; a right given by International Law to stop and examine neutral ships, an interference not tolerated apart from treaties in time of peace; while a duty is imposed towards enemy merchant vessels to ascertain their nationality in order to give effect to certain well recognized exemptions from capture as well as to avoid unnecessary loss of life. Enemy merchant ships, as is generally recognized by international law, may, under certain circumstances, be destroyed after capture, but their destruction, without first taking the necessary steps to ascertain definitely their nationality and character and affording an opportunity to their passengers and crews to be placed in safety, is contrary to the Law of Nations.³

The exercise of the right of visit and search has often been made the subject of complaint by neutral Powers. Attempts

¹ Marshall, C. J., in *The Nereide*, 1815, 9 Cranch, 388, at p. 427.

² Lord Stowell in *The Maria*, 1799, 1 C. Rob., 340, at p. 359.

³ Ch. Dupuis, *Le droit de la guerre maritime* (1899), p. 349.

have been made from time to time to define the procedure, and to limit its operation as regards the areas within which it may be exercised. Sometimes these attempts have been momentarily successful, as during the Boer war, when Great Britain made certain concessions to Germany,¹ but such limitations have never become part of the Law of Nations, and every belligerent state has, when necessary, asserted its full rights regardless of any protests it may have made or of any limitations it may have demanded when neutral.

The ship to be visited has to be called upon to stop, an officer and men are sent on board to examine the ship's papers, and in the old wars they searched the ship on the spot for any evidence showing either enemy ownership or the carriage of contraband, analogues of contraband or attempt to break blockade, or the commission of acts of unneutral service.

The stages of visit and search and detention under the former British practice are set forth in the *Manual of Naval Prize Law*, edited by Professor T. Erskine Holland in 1898. Articles 195-216 deal with the details of visit, and the visiting officer is instructed that if upon boarding he is at once satisfied that the vessel is not liable to detention, he is to quit her immediately (Article 206). Articles 217 to 230 deal with the mode of search, and clearly point to search on the spot where the visit is effected. Articles 231-251 are headed "Detention," and the commander, if he has reason to entertain suspicion and is not satisfied with the master's explanation, is authorized to detain the vessel on probable cause (Article 233), but he is warned that should it subsequently appear that he has ordered her detention without probable cause, he may be held liable in costs and damages (Article 234). Subsequent articles regulate the proceedings on detention or capture, e. g. notice to the master, putting an officer and crew on board, ordering the vessel to sail according to direction, &c. The whole section indicates that "detention" is the first stage of capture, and in the first article of *The Manual* the powers of a commander are stated to be, "visit, search, and detention (with a view to adjudication)." The entire procedure shows that when restraint has been placed on the movements of the ship, whether it be called "detention" or "capture," the jurisdiction of the Prize Court arises.

The search under the old practice generally took place at

¹ Parl. Papers, Africa, No. 1 (1900), pp. 20 and 45.

sea, but in recent times since the introduction of steam and the greatly increased size of vessels, a practice grew up and became general during the late war of sending vessels into port for the purpose of search. Sometimes a vessel was ordered to make for a port, and went without further compulsion, at other times an armed guard was placed on board or the master was ordered to navigate to the order of the visiting ship. As the war progressed, arrangements were made by neutral shipowners for their vessels to call at belligerent ports for the purpose of examination. The British and Allied Powers claimed that having regard to the altered conditions of commerce and the increased size of vessels, and under the conditions under which the Central Powers were conducting submarine warfare, search at sea was impossible, and that the detention in port after the diversion of the vessels was a legitimate extension of the long established right of search.

The United States, before their entry into the war, objected to this method of treating neutral merchant ships, and a correspondence on the subject between the British and United States Governments ensued. In a note dated November 7, 1914, the United States Government maintained that "search should be made on the high seas at the time of the visit, and that the conclusion of the search should rest upon the evidence found on the ship under investigation, and not upon circumstances ascertained from external sources."¹ In a further note of December 28, 1914, the United States Government, while admitting the right of search on the high seas and the detention of vessels "when there is sufficient evidence to justify belief that contraband articles are in their cargoes," protested against American ships or cargoes being taken into British ports and "there detained for the purpose of searching generally for contraband, or upon presumptions created by special municipal enactments which are clearly at variance with international law and practice."²

To these contentions the British Government replied on January 7, 1915, that under modern conditions the right of search could only be exercised in port, especially in view of the elaborate arrangements in vogue for concealing the identity of

¹ Parl. Papers, Misc., No. 6 (1915) [Cmd. 7816], at p. 12; *American Journal of International Law*, Special Supplement, July, 1915, p. 74.

² Parl. Papers, Misc., No. 6 (1915), p. 3; *American Journal of International Law*, *ibid.*, p. 58.

cargoes.¹ In a further note of February 10, 1915, it was pointed out that the growth in the size of steamships necessitated their being taken into calm waters, especially since "the conditions during winter in the North Atlantic frequently render it impracticable for days together for a naval officer to board a vessel on her way to Scandinavian countries," and that such a course had been pursued in the American Civil War, the Russo-Japanese War, and the Second Balkan War. The note also explained that the necessity for giving the belligerent captor full liberty to establish enemy destination by all the evidence at his disposal had been recognized by the American Prize Courts during the Civil War, and that the principle enunciated by the United States Government was inconsistent, not only with previous British practice, but also with American precedents.² The correspondence was continued in a note of the United States Government of October 21, 1915, in which a rejoinder was made to the British contentions,³ and on April 24, 1916, the British Government again restated their position and that of the French Government in greater detail.⁴

The views of the British Government received considerable support from American writers both at the time and afterwards, and Professor C. D. Allin, of Minnesota, says :

"In fact, so far as naval measures are concerned, it must be confessed that the methods now employed do not differ materially in principle from those which were successfully used during the Civil War. The Allies have simply developed the system of inquisitorial examination and supervision, so as to secure a maximum of belligerent efficiency, and the neutral nations of to-day, as of the time of the Civil War, are naturally kicking hard against the pricks."⁵

The modern idea of "detention" in connexion with search is for the purpose of ascertaining whether there is sufficient evidence to justify the issue of a writ against ship or cargo and

¹ Parl. Papers, Misc., No. 6 (1915), p. 5; *American Journal of International Law*, *ibid.*, p. 63.

² Parl. Papers, *ibid.*, p. 12; *American Journal of International Law*, *ibid.*, p. 74.

³ Parl. Papers, Misc., No. 15 (1915) [Cmd. 8234], p. 3; *American Journal of International Law*, Special Supplement, 1916, p. 73.

⁴ Parl. Papers, Misc., No. 15 (1916), p. 20; *American Journal of International Law*, *ibid.*, p. 120.

⁵ *The Minnesota Law Review*, April, 1917. See also A. S. Hershey, 10, *American Journal of International Law*, p. 538; Admiral C. H. Stockton, 14, *ibid.*, at p. 363, who points out that while it is difficult in stormy weather and high seas to examine small vessels with simple cargoes, in the case of large vessels with great and complex cargoes the difficulties are "almost insurmountable"; J. W. Garner, *International Law and the World War*, Vol. II, p. 294; *ibid.*, *International Law* (1925), pp. 366, 788.

the commencement of proceedings for adjudication by the Prize Court. Neutral vessels were sent in to British and Allied ports during the late war for the purpose of a physical search¹ which was impossible at sea, but they were also sent in in order that the large amount of evidence under the control of the Contraband Committee and the War Trade Intelligence Department might be used in order to enable a decision to be taken as regards Prize Court proceedings. Practically all the cases relating to contraband in the English Prize Court involved the application of the doctrine of continuous voyage or ultimate destination, and extraneous evidence was in all of them essential for a full examination of the facts relating to each vessel and cargo. The necessity for this full examination of all circumstances was upheld by the Privy Council in *The Edna*,² when Lord Sumner, in delivering the judgment of the Court, dealt with what he called

“a somewhat singular argument that the vessel should not have been detained at all, for all her papers were in order, nothing on board of her or connected with her then ownership or employment awakened any just suspicion, and those who seized her are not shown to have had at the time any knowledge of such circumstances of suspicion as have since been elicited on a scrutiny of the evidence.” Their Lordships thought that such a contention unduly narrowed the right and ability of seizure as a preliminary to trial and condemnation. “Unless search after the truth is to be abandoned in such cases or denied altogether, it must follow that on grounds wider than the mere practice of the Prize Court as settled under the authority of the present statute, captors are entitled to justify detention of a ship even though she is subsequently released on grounds only made apparent upon an examination of subsequent evidence given on either side.”

In *The Falk*,³ the Court held that where a vessel is diverted and seized on reasonable suspicion, that is a good defence to an action for damages, though subsequent investigation may show that the suspicion, so prominent when the vessel was brought in, diminished as investigation proceeded. The views expressed by the British Government as to the legality of search in port have been fully borne out by decisions of the Prize Court,⁴ and in a number of cases where statistical evidence showed increased imports into a neutral country adjacent to a belligerent state, though the vessel and cargo were released, this evidence was

¹ Neutral ships were also similarly sent into German ports, see *post*, p. 49.

² 3 B. & C.P.C. 926.

³ 3 B. & C.P.C. 955.

⁴ *The Zamora*, 2 B. & C.P.C. 1; *The Elve* and *The Bernisse*, 3 *ibid.*, 517, 771; *The Falk*, v.s.; *The Regina d'Italia*, unreported.

sufficient where a seizure was made to justify it and to exonerate the captor from liability.¹

In a case recently decided by the Court of Appeal, a neutral ship, the *Sommelsdijk*, was sent in for search in an English port with an armed guard on board and accompanied by a gunboat.² Neither the vessel nor any portion of the cargo was seized in prize, and after a careful search, she was released. Proceedings were commenced on behalf of the ship for damages for the detention before the War Compensation Court under section 2, subsection 1 (b) of the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48). His Majesty's Procurator-General appealed against the decision of the Court that it had jurisdiction to entertain the claim, and the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) upheld the Procurator-General's contention that the War Compensation Court had no jurisdiction. The Court of Appeal held that the detention of the ship was sufficiently a "capture" to bring the act within the meaning of this term in the Commission of the Prize Court, and that that Court alone had authority to entertain a claim in respect of detention. The Court of Appeal was provided by the President of the Prize Court with a list of cases where "detention" had been dealt with by his Court, and in *The F. J. Lisman*, November 19, 1919 (unreported), he said: "Wrongful detention may give cause for an award of damages by the Prize Court, and any wrongful or vexatious act in the course of the exercise of belligerent rights of seizure or detention may give cause for such award." The right to bring in a vessel for search was not questioned by the Court of Appeal, any more than it had been questioned by the Prize Court. But it appears to follow from this decision and from the dictum of the President of the Prize Court, that every time a vessel is stopped and sent in for search, the Prize Court obtains jurisdiction, and that aggrieved persons can apply to it for redress,

The Prize Court has jurisdiction over the exercise of belligerent rights at sea or in port where neutral or enemy property is involved. Visit, search, and capture are belligerent rights. Where the proceedings of visit and search are conducted without any impropriety, no liability will attach to the visiting officer or to his superiors, but "the right must be exercised with as

¹ *The Baron Stjernblad*, 3 B. & C.P.C. 17.

² *The Netherlands American Steam Navigation Co. v. H. M. Procurator-General* (1926), I.K.B. (C.A.), 84.

little of personal harshness and of vexation as possible.”¹ It would appear that the Prize Court has jurisdiction where any compulsion is brought to bear upon a ship, such as compelling her to deviate from her course for the purpose of search, though no seizure in prize is made. Even where a neutral vessel is in a belligerent port or voluntarily enters such port and is not allowed to leave until a complete search has been made, the Prize Court would probably have jurisdiction to entertain any claim for the improper exercise of the right or for undue length of detention for search.

So far we have been primarily concerned with the British practice of diversion and detention for search, but the practice was followed by other belligerents in the late war. Dr. Verzijl, in his great work on Prize Law during the Great War,² says that the practice of taking ships into port for the purpose of search became usual during the war of 1914. The German Prize Regulations issued at the beginning of the war authorized the diversion of vessels for search where necessary.³ The German terminology is not always consistent as regards “detention,” “capture,” and “seizure,” and there appears to be sometimes a confusion between bringing a ship into port for the purpose of search, in the sense merely of detention, and bringing her into port for prize proceedings. The importance of this distinction is due to the fact that in the view of the judges of the German Prize Court that Court has no jurisdiction where a vessel is brought into port merely for the purpose of search, or in case of provisional seizure, and any complaints arising from this procedure must be made diplomatically. A German Prize Court can, therefore, only award damages where a definite capture has been made and proceedings in prize have been instituted, but not where a diversion has been ordered and the ship has been detained for search and subsequently released.⁴

As regards French procedure, it may be recalled that the

¹ Sir W. Scott in *The Maria*, 1. C. Rob. 340.

² For review of this book, see *post*, p. 240.

³ Articles 81, 85, 91.

⁴ See the cases of *The Bertha Elisabeth*, Nos. 1 and 2; *The Dux*, *The Star*, *The Niobe*, cited by J. W. Verzijl, *Le droit des prises de la grande guerre*, p. 1211. The judgment in *The Goethe* delivered by the Imperial Prize Court of Berlin on February 17, 1916, states: “The ship was only brought into port for the purpose of examination. It has been repeatedly held by the Supreme Prize Court (see the cases of the *Niobe* and *Bertha Elisabeth*) that in such circumstances there is no case for the Prize Court, as, by § 1 of the Prize Court Rules, Prize Courts have to give decisions only in cases of completed seizure.”

French Ministry of Marine shared the views of Admiral Jellicoe on the question of search at sea, and a statement of these views formed part of the note delivered by the British Ambassador to the United States on April 24, 1916. The validity of search effected in port has been upheld in a number of cases in the French Prize Courts.¹

The Italian courts in numerous cases have admitted the validity of diversion to a port for search. This procedure is expressly provided for in the Naval Instructions of 1915 and 1917.² The Roumanian Code (Article 21) provides that a ship which refuses to enter a port for the purpose of search shall be presumed to have an enemy character.³

There appears to be a very strong body of opinion, in addition to the practices of the belligerent states already dealt with, in favour of the view that under modern conditions of war and commerce it is now impossible in the majority of cases satisfactorily to deal with neutral vessels except by diverting them either into a belligerent port or into quiet waters where a physical search can be conducted effectively. The object of visit and search is to ascertain whether the vessel or cargo or both are liable to capture for breach of well recognized rules of war. The history of the developments of those rules shows that new devices for the assistance of one belligerent have invariably led to changes in the mode of conducting operations by the other. The evolution of the application of the doctrine of Continuous Voyage in the nineteenth century by the Prize Courts of the United States affords a striking instance of the adaptation of the law to meet altered circumstances. Similarly, the system elaborated by the belligerent Powers during the war of 1914-18 was with a view of securing the maximum efficiency in pursuing a legitimate and well recognized object.

This development of the right of visit and search as ancillary to capture takes into account novel requirements and the necessity of adapting traditional methods to the altered conditions of war. Jurists who consider that the laws of naval warfare

¹ See the cases of *The Federico*, *The Barcelo*, *The Rioja*, *The Alfonso XIII* (Verzijl, *op. cit.*, p. 1169).

² Verzijl, *op. cit.*, p. 1170. The Italian Naval Prize Regulations of July 15, 9, 5, state that commanding officers, whenever it is judged useful, shall proceed to visit merchant ships on the high seas or in belligerent waters, or may request them to proceed to the nearest port to undergo visit there (Parl. Papers, Misc., No. 18 (1915), p. 6).

³ Verzijl, p. 1170.

reached their final and complete development at the end of the wars of the Napoleonic era will raise their protests against this adaptation to modern conditions of a long-established right. They refuse to learn by experience, just as many of them protested against the American development of the doctrine of Continuous Voyage to Contraband. International lawyers must face facts, "s'ils ne veulent point exposer leurs systèmes aux perpétuels démentis de l'expérience."¹ A study of the cases relating to Contraband decided by the Prize Courts of this country during the late war will be sufficient to prove the futility of relying on the methods which were found sufficient in wars before the introduction of steam, electricity, railways, and aircraft as means of communications, and before the increased size of merchant ships made search at sea in most cases a physical impossibility. The contraband traders of the time of Lord Stowell were clever, but the modern contraband trader would consider them to be but tiros at their profession. Search at sea, even had it been possible, would in the majority of these cases have revealed nothing to justify the condemnation of the cargoes. Most of the evidence came from extraneous sources. The destinations of the cargoes were left skilfully open, and to prove that they were hostile required "that truth should be collated from a variety of sources darkened and disguised ; from others opened as the cause advanced, and by accident only : from coincidences undesigned and facts that were circumstantial."²

Belligerents will certainly in the future assert a right to treat neutral shipping as it was treated in the late war in regard to diversion and detention for search. It may well happen that such detention will not be always necessary, and it is easy to envisage wars in which it might be practically impossible to enforce it. But where it is felt by the belligerent to be the only means of effectively preventing his adversary from receiving supplies of contraband or other unneutral assistance, all the necessary steps to make visit and search as efficient as possible will be adopted, and the practice of search in port is certainly one of these. It is believed that Prize Courts will continue to support a belligerent's right in this, as it is only thus that there can be a full investigation into the nature and destination of the ships' cargoes.

¹ Ch. Dupuis, *Le droit de la guerre maritime* (1899), p. ix.

² Reporter's head-note to the case of *The Bermuda* (1865), 3 Wallace, 514.

Nevertheless, safeguards against the abuse of this right are necessary. Any diversion or detention must be of the shortest possible duration, and a decision must be taken as early as possible as to whether such a detained vessel should be allowed to continue on her voyage or whether proceedings in prize shall be taken against her or any part of the cargo. So far as British Prize Law is concerned, the question of the reasonableness of the whole proceeding can be tested by application to the Prize Court, and compensation should in all cases be awarded where the Court is satisfied that there has been unreasonable diversion, undue delay, or unnecessary interference with the ship's voyage. The late Professor Sir H. Erle Richards, who had a great experience in the English Prize Courts during the late war as counsel for neutral claimants, reached the following conclusion on the subject of detention for search: "As to detention on suspicion, it is reasonable to allow some delay for making inquiries, but if the detention be prolonged beyond that time the Court ought to give compensation, and it is thought that the Prize Courts ought to be more generous in this respect than they have been in the past."¹ As I have already indicated, I hold the same opinion.

The inconveniences and delays occasioned to neutrals by the exercise of the right of search in port were greatly mitigated in the late war by various arrangements made between the belligerent Governments and neutral shipping lines. Also there came into being associations of merchants in neutral states whose guarantee was accepted for goods consigned to them. But probably the most promising method by which friction between neutrals and belligerents as regards the carriage of contraband or goods for blockaded areas may be avoided in the future was the inauguration of a system of certificates, the possession of which greatly facilitated the passage of the cargoes concerned.² As regards the shipping companies, various agreements were made between the Allied Governments and several lines, whereby "Letters of Assurance" were issued to them after their cargoes had been approved as innocent. This system was found to work well, and traders in the United States availed themselves of a similar system, which received the name of "Navicerts,"

¹ *British Year Book of International Law*, 1920-1, p. 24.

² For details of the various methods employed by Great Britain during the war of 1914-18, see *Parl. Papers, Misc.*, No. 2 (1916), and No. 6 (1917).

whereby their cargoes were certified at the port of shipment by representatives of the Allied Powers. Delays for further inquiries were thus eliminated, uncertainty as to the interruption of bona-fide neutral trade ceased, and the neutral exporter obtained security in his undertakings.¹

So long as the present system of international law relating to neutrality remains in force, the friction which invariably occurs between belligerent and neutral claims may be eased if certain of the methods just referred to, and particularly some system of certification of cargoes by the representatives of the belligerent Powers at their ports of shipment, are adopted.

There are grave objections to the issue by neutral Governments of certificates of their ships' papers, as has been suggested by some writers.² Such a procedure would impose a heavy burden and responsibility on such Governments if they were willing to undertake it, and should cases occur in which it was proved that their confidence had been abused, delicate situations would arise which might prove more dangerous to the peace of the world than those which happen under the existing practice. Moreover, such guarantees would certainly not be accepted from or by all Governments, and any distinction in this respect would be invidious and embarrassing both to the belligerent and to the neutral states. Freedom for bona-fide neutral trade and immunity from interruption were greatly facilitated by the methods above referred to, and it is believed that they afford valuable precedents as means of reconciling neutral and belligerent interests. They merit serious study in order to ascertain if they can be improved in such a way as to reduce still further the inconveniences which neutral traders suffer from the exercise of the right of visit and search without weakening the belligerent's right of capture.

¹ The Instructions given to the British Delegates at the Second Peace Conference at The Hague in 1907 by Sir Edward Grey stated that His Majesty's Government would be glad to see the right of search limited in every practical way, e. g. by the adoption of a system of Consular certificates, declaring the absence of contraband from the cargo (Parl. Papers, Misc., No. 1 (1908), p. 11, reprinted in my *Hague Peace Conferences*, p. 623).

² C. Cheney Hyde, *International Law* (1922), Vol. II, p. 444.

INTERNATIONAL ADMINISTRATION

By C. DELISLE BURNS, M.A.

PART I. THE PRE-WAR SYSTEM.

INTERNATIONAL law, whatever its differences from other kinds of law, is at least sufficiently like them to be affected by a general change of conceptions and methods of government. But a most significant change has occurred in the relations between law and administration within the modern state, and we can appreciate the character of this change by seeing it in historical perspective.

In comparatively simple societies the rule or custom is unformulated; and the first effort of the group-mind, or the minds of men acting in unison, is to make the rule clear. The primitive king or prophet "knows" the custom; but that means only a greater insight or ability to perceive what all men at least dimly appreciate. The king states the law; he does not make it. Thus Grotius states the "natural law." But custom is not adequate when new relations arise. New laws are needed, which cannot be found in the remembered store of traditional customs, and even the vivid imagination of simple minds cannot create the belief that the new laws always existed. An effort of imagination is sometimes made by lawyers to explain the new law as a mere interpretation of the old tradition, as imagination was used by those philosophers who found the national will "*toute formulée dans le silence des peuples.*" The cynic laughs, for man is so infinitely gullible. Man, however, recovers his realism, and the group-mind consents to see that laws are really made. The declaration of law gives place to legislation, and this may be compared in the history of international law with treaty-making. Legislation still in our own time dominates the interest of historians. History is still largely an account of systems for the making of laws—Parliaments, Hague Conferences, and the rest. But the next stage is already here. It begins to be perceived that the efficacy of laws is much increased if administrative machinery is connected with them;

and again, looking back, it is perceived that laws are not made out of nothing—that in fact most laws are made only after a great number of people are doing or wish to do what the law “commands.” The very form of law may then change. Legislation begins to say *not*—“This shall be done *by* the citizen,” but “This shall be done *for* the citizen.” That is to say, law formulates *administration*, and administration then becomes not merely a method of making ordinary citizens carry out the law (police and inspection), but also a new outlet for social life (direction and development). At this stage, it seems, not only does administration arise out of laws, but laws (rules, regulations) arise out of administration. Administration necessitates further definition of what was at first only vaguely desired.

International life has now reached this stage.

It is for jurists to say whether in fact the forms of international law are changing. I shall not venture to do more than ask a question. Did not international law in its earlier stages seem to consist of rules governing the action *by* states, taken as “subjects” of the law, although they were not under authority? And do not the later documents of international law seem to be creations of instruments for the performance of new tasks *for* the states concerned? The contrast may be found if one compares the Geneva Convention (Red Cross) of 1864 with the Covenant of the League of Nations, in so far as it sets up a new organization. But if there is a real contrast, then Grotius is as much out of date with respect to modern international life as Bodin is with respect to modern national government. Of course this does not mean that they are negligible, for one need not question the validity of their reasoning. Their unstated assumptions, however, appear to be doubtful. The assumptions of Grotius fit the Geneva Convention of 1864, and Hall, speaking of this convention, says: “The states bound themselves not to do” certain acts; but the Covenant of the League says in fact “this shall be done for the States Members.” What is here implied is that in international law one may find the same differences as those noticed in British law by Sir Courtenay Ilbert. In his *Legislative Methods and Forms* he says: “The kind of law with which Parliament is mainly concerned is not the kind about which jurists are in the habit of speaking and writing. . . . The bulk of the Statute book of each year usually consists of administrative regulations.” The change has come since 1832,

and the result, as Ilbert says, is "the building up of an administrative machine of great complexity which stands in constant need of repair, renewal, reconstruction and adjustment to new requirements."¹ Similar changes have occurred in all modern states. The evidence of these changes is to be found, first, in the number of new governmental offices or ministries set up in recent years, and, secondly, in the increase of Statutory Orders in Great Britain and corresponding quasi-legislation abroad. Administration, indeed, within all modern states has become more important and has probably changed the character of law, and it is, therefore, not unreasonable to suppose that a similar change has occurred in international life. Obviously, the change to which reference is here made has a close relation to the change from "actes d'autorité" to "actes de gestion," from the "sovereign power" to the "public service" of the state.² The new administrative offices and methods are not generally an extension of state power, but of state services; and similarly, in the international sphere, the new international organizations, such as the League, are in the main extensions of state services, not of state power. Indeed, if administration and not the statement of law or treaties were made the basis of the discussion, the old problem of sovereignty would appear in an entirely new light, for then the advance of international organization would *not* appear to be a limitation of sovereignty. Even the distinction made by the French jurists is misleading. It is not a fact that "actes d'autorité" are in contrast with services. The fact is that the *services* for which the state exists change in character; they are less and less services of defence or police and more and more services of direction and development, as Mr. Hawtrey seems to indicate in *The Economic Problem*, where he contrasts "wealth and power" with "welfare" as the object of policy. The fundamental problem for our purposes here is the character of international administration. Does it represent in the sphere of international jurisprudence the same change from "actes d'autorité" to "actes de gestion," from sovereignty to service, or, more exactly, from Renaissance sovereignty to a new form of state-activity?

We may omit the larger question of international juris-

¹ *Loc. cit.*, p. 209 *et seq.*

² Cf. H. Barthélemy, *Droit Administratif*, p. 40 *et seq.*, and Duguit, *L'état, le Droit objectif et la Loi positive*.

prudence or the philosophy of international law, and we must perforce also omit the *history* of international administration. Obviously, the system of the Roman Church in the Middle Ages was a form of international administration. As it is said that the signs of religion are a hymn, a sermon, and a collection—chiefly a collection, so one may say that the signs of administration are uniform sentiments, judicature, and taxation—chiefly taxation, all which appear in the medieval Church to have been international. But the medieval world dissolved, and a new world of states was formed out of the nebula of feudalism. We omit the history of the system and come to an analysis of existing international administration.

By international administration is here meant the performance by official agents of tasks assigned by an international authority, that is to say, a joint body representing two or more Governments.¹ We may distinguish the administration from the executive. The system and the persons we are to discuss are like the civil service of the central Government in Great Britain, not the Cabinet or the Ministers or Parliament as an Executive body when it asks questions. We omit, therefore, the Council and Assembly of the League—even if they are in the international sphere a quasi-Executive, or, what is still more doubtful, a quasi-Legislature. We are concerned with the officials and the system through which their work is done. But in that sense international administration at present includes systems of different dates. There are roughly three quite distinct systems which originated at different stages of international life and imply different principles. First, there is the system in Tangier or the New Hebrides; secondly, there is the system of which the Universal Postal Union is typical; and thirdly, there is the system in the Secretariat of the League and the International Labour Office. The first two are comparatively old and have been frequently described and discussed. In the New Hebrides there is rather a judicature than an administration, strictly so called; but in a sense the officials form an international administration. Both there, however, and in Tangier, even under the present Convention, the principle is that each state concerned retains its own officials. The officials are not internationalized, and their work is inter-

¹ Thus we omit the larger meaning of administration in which it is confused with executive power, as in Sayer, *Experiments in International Administration*, 1914.

national only in the sense that a crowd at the Gare du Nord may be international. The separatism of the Renaissance state prevents the amalgamation of the administrative elements. The work may be under an international agreement and for a common purpose, but each element looks with a jealous eye upon every other.

Frankly, the system appears to be ridiculous to any one aware of the nature of government, but we have examples of the same kind of defects in British local government. Where two local authorities, each jealous of the other, find that they have to work together, each tends to obstruct the work of the other. One hesitates to assimilate the lofty regions of diplomacy to the simplicities of a rural district council, but who is to inspect the country cows which give the city milk? The "condominium" method tends to perpetuate tuberculosis and to let rascals have a free run. It is quite futile to sign the most lofty "conventions," for the administrative method is obsolete. In Tangier we have the additional difficulty that some of the governmental units operating in the area refuse to come into the system agreed upon by the others.¹ The old system seems to have proved abortive as administration and to have had no important effects upon the character of international law.

The second of the older methods of international administration is not obsolete. It is embodied in the Universal Postal Union, which has been well described by Mr. L. S. Woolf;² but there were, of course, several pre-war institutions of a similar type. Here a great number of governments agree to two quite distinct kinds of acts: (a) to set up a single office maintained by an income drawn from the parties to the agreement, and (b) to let their officials act for the common purpose of the parties under rules agreed internationally. The former act can be understood more easily when we come to discuss the League Secretariat; but the latter act is of unique importance. It means that the village postman of England or France, delivering a letter with a foreign stamp, is acting as an international official. That is a form of international administration, but in this form the states, as it were, themselves act as agents or instruments of an international "will." The village postman, although acting directly under orders from his own Government, is indirectly

¹ Cf. articles in *The Times* of February 16, March 2 and 3, 1926.

² *International Government*.

serving the authority whose directions his Government has agreed to follow, and he is certainly acting for the benefit of citizens of other states whose stamps are on the letters. Sovereign power begins in such a system to interpenetrate other sovereignties.

The important point for us here is the effect of this form of international organization upon the relation of states. The mere *continuity* of the contacts under the Universal Postal Union marks a new stage in the history of government and indicates that the old diplomacy of contending interests is obsolescent. States have begun to co-operate for a common purpose and through one administrative system. With respect to acts based upon international agreements, the postal services of the states in the Universal Postal Union form a single administration. There were before the war and still are several examples of international administration within a more restricted territorial area. For example, the European Commission of the Danube has carried out international agreements since 1856, and its officials are a sort of international civil service. It flies its own flag on its own ships and offices. This commission has been continued in existence by Article 346 of the Treaty of Versailles, and a new International Commission of the Danube was established by Article 347, the other reaches of the river, not under the old Commission, being, in the words of the treaty, "placed under the administration" of the new body. This new body also flies its own flag, marked "C.I.D.," instead of "C.E.D." as for the old Commission. But there is also a more significant difference; for, as it has been pointed out, "the administrative functions of the two Commissions differ in that the European Commission exercises a *state control*" within its jurisdiction, whereas the International Commission leaves to the states concerned the administration and only advises or supervises.¹ The same methods of international administration are to be found in the Rhine Commission of the Convention of Mannheim, 1868, continued by Article 354 of the Treaty of Versailles,² the Elbe Commission under Article 340, and the Oder Commission under Article 341. In all such cases the work of the officials affects the attitude and relations of the Governments represented on the Commissions.

¹ Cf. G. E. Sherman, "International Organization of the Danube," *American Journal of International Law*, 1923, No. XVII.

² Cf. E. Borel, *British Year Book of International Law*, 1921-2.

Outside the strictly governmental sphere were the Commissions for the Ottoman Debt, the Greek Debt, and the Suez Canal. These were, or still are, financial administrations in which, although each nation had a separate interest, the officials were, or still are, entirely international. The Chinese Maritime Customs Service is another instance ; but although the employers are of various nationalities, their numbers proportionate to the amount of trade of the several countries, the Chinese Government is supreme under certain agreed conditions.

It would clearly be impossible to describe all the forms of international administration even of pre-war date, but the general principle is sufficiently clear. New and varied forms of administration have been growing up since the middle of the nineteenth century, in which the service is rendered, not to any separate state, but to a new governmental unit. It follows that "nationals" in such services must acquire a new technique, and that the influence of the whole body of officials of any such service tends to bring together parts of the administrations of the several states. All such institutional units represent a situation in which law says, not "This shall be done *by* the states," but "This shall be done *for* the states concerned." This new method may be said to have displaced the older method of the condominium, especially because the separatism of the Renaissance state is not preserved within the administrative machine. The system and the officials are genuinely international.

The end of the war, however, was not the end of obsolete methods of government ; for the same treaties which created the League perpetuated the old mistakes of the condominium method in administration. Thus the Reparation Commission and the Conference of Ambassadors are examples of old methods. The staff of the Reparation Commission is divided into national groups, taking orders from separate national authorities : such a staff, therefore, is not an administrative unit. The method is *multi-national*, not *international* ; and similarly, although the Ambassadors Conference has no special staff, the officials who deal with its business are national officials, obeying separate national representatives. The results for the development of international law and international government generally have been insignificant, for the so-called "Dawes" scheme utilized League methods to avoid the absurdities of the methods embodied in the system of the Reparation Commission. In such criticism

no reference is made to policy, but only to administrative efficiency, and it appears to be generally recognized that the "office work" of the Reparation Commission is unduly cumbersome, although this may be inevitable in view of the task to be accomplished.

PART II. THE LEAGUE SYSTEM.

We come now to the Secretariat of the League and the International Labour Office.¹ It is not necessary to describe the organization of the two offices at Geneva, nor to give details of their work. We are concerned here only to interpret their position in the machinery of government. Clearly they belong to the tradition of international bureaux and offices such as the Universal Postal Union, but there is one very great difference. The Secretariat at Geneva has grown partly out of the experience of inter-Allied Commissions during the war. The common purposes of allies in war do not admit of abstract discussions as to the limits of sovereignty, and for the last few years of the war the belligerent groups on both sides had learnt to work together for the supply of common needs. The machine devised for this purpose, as every one knows, was a Council or Commission of Ministers of different nations with a permanent secretariat, subordinated to this international body. This has been the experience on which the Council and the Governing Body of the International Labour Office with their secretariats now depend.

Complaint has often been made that the enthusiasm and organizing ability which go to supply public service in wartime are not usually available in time of peace. But in the case of the League Secretariat perhaps we have an exception to the rule, for the methods of joint action in wartime for common needs have been carried over into peace. It is true that the hopes of international organization of trade which some held at the end of the war have not materialized, but the League stands for a kind of internationalism. There is, however, another important difference of principle between the pre-war organizations and the League. In the Universal Postal Union and in the wartime inter-Allied Commissions the task to be performed was clearly defined before the administration was established. In the League

¹ What follows is partly due to conversations with members of the Secretariat, whose names clearly cannot be given, partly to observation of the system in operation, and partly to personal experience on the staff of international committees.

and the Labour Office the work to be done was only in part defined by the original documents. There were, of course, definite governmental tasks in the government of the Saar and the supervision of Danzig. But the greater part of the work which has in fact been done by the League so far was *not* defined in the documents which founded the League and the Labour Office. Indeed, with regard to the restoration of war prisoners, the campaign against typhus and the financial reconstruction of Austria and Hungary, it may fairly be said that the administration in the League system led to new steps in international law, exactly as the work of the Ministry of Labour led to the Industrial Courts Act. Thus international administration is not only instrumental, it is an actual source of new law. But how far this is the case could be ascertained only by an examination of the treaties and conventions or recommendations which can be traced to origins in the needs of the League system. In principle it is clear that Article 23 of the Covenant foreshadowed action by a new governmental instrument, but did not define the precise limits of such action, as, for example, the Acts creating new ministries do not normally delimit their functions. Article 23 definitely says that the states Members will "entrust the League with the general supervision" of traffic in drugs, of trade in arms, &c., and it indicates more vaguely the work in regard to labour conditions, natives in colonies, freedom of transit, and the prevention of disease. Similarly, Part XIII of the Treaty of Versailles, Article 387, says: "A permanent organization is hereby established for the promotion of the objects set forth in the Preamble," and the objects in the Preamble are prefaced by the significantly indefinite phrase, "as, for example." Thus the regulation of hours of work and the other measures named are not the only purposes of the International Labour Organization, and the only function for the officials which is defined is that in Article 396—"the collection and distribution of information." The rest of Part XIII is the creation of a governmental machine. This does not imply weakness in the League or the International Labour Organization, but it points to the intention of the treaty-makers that the League should build up an administration continually expanding its activities on the basis of the general principles laid down.

We may now proceed to discuss how far the actual experience of the past six years has developed a new international system.

In the first place, the Executives of the League and the Labour Organization, being very different from pre-war international commissions and conferences, require a different type of administration. The Executives are responsible ministers, not specialists, as in the case, for example, of the Danube Commission. The Secretariat, therefore, is more extensive and of a more "responsible" type. They rank with the highest officials in the national administrations. One hesitates to say that the "open diplomacy" or "diplomacy by conference" which was supposed to be essential to the League system must make the Secretariat also a new type of diplomatic officers—for secret bargains may still survive!

Secondly, the administration in the League system touches a far greater part of the national administrations than any former international system has done. For example, League business is now dealt with in Great Britain by the Foreign Office, the India Office, the Ministry of Health, the Dominions Office, the Colonial Office, the Board of Trade, the Home Office, the Ministry of Labour, and the War Departments. The officials of the League are in contact with officials in all these departments. Never before has international government gone so far, and the change is affecting even national legislation.

There are several different kinds of international administration within the League system. For example, there are the direct administration of the Saar territory, the less close control over Danzig, and the still more indefinite methods of the Mandates and Minorities sections. In all such cases the subject-matter, so to call it, is varied; questions of taxation, law and justice, education, commerce, and the rest are all included and are dealt with by international officials who are not responsible to any separate state. But there are also specialized systems of administration, where the subject-matter or field of action is limited; for example, there are the officials of the administration of the Austrian reconstruction loan, of the similar loan for Hungary, and of the Greek refugee loan. In these cases the administrative system centres in the Economic section of the League Secretariat; but it should be noted that this section is in continuous close touch with the officials of the Treasury or Ministries of Finance in the several states which have guaranteed the loans. In fact, there is a continual going and coming between Geneva, London, and Paris, and in this sense the international

officials in Geneva and Vienna and Budapest and Athens are part of the system of which the British Treasury and the French Ministry of Finance are other parts.

Again, take the administration in and in connexion with the Communications and Transit Section at Geneva. The Barcelona Conference is already ancient history, but the problems of transmission of electric and hydraulic power introduce new principles. The draft conventions of 1923 were the result of the work of the League Secretariat after the Barcelona Conference. The discussions of the Conference on Transit at Geneva in November, 1923, show the obstacles to a new system, for although the representative of Italy said that "the growing international aspect of the transmission of electric power necessitated the intervention of the League," the ghost of Renaissance sovereignty was raised by the representatives of Belgium and Switzerland. The mind of the new system, expressed by a member of the League Secretariat, showed that the two objections (1) that sovereignty was infringed, and (2) that the new convention made no difference at all, really cancelled one another.¹ From a central point of view, the separatism of governments which all desired the same thing was seen to be absurd.

In technical matters even the national officials who act on behalf of separate states tend to appreciate the interests which are common to many states. Thus railway officials from different countries tend to agree with one another, even if politicians "representing" the different countries disagree, and perhaps a knowledge of the subject will eventually enable internationalism to displace "representative" national prejudices. This has been the experience not only of the Transit work, but also of the Health work of the League. But on the other hand, a new system has against it the vested interests of those who benefit by the old system, who are themselves sometimes officials. With the technique of international administration, however, we are not here concerned; it is enough if the growth of a new system affecting the relation of states be apparent. There is at any rate some tendency to perceive and pursue the common interests of many nations, in spite of the divergent interests of some.

In the International Labour Office the same tendencies are to be found. It is itself a creation of administrative legislation

¹ Report (C. 30, M. 16, 1924, VIII), p. 11. It may be noted that Brazil proved to be recalcitrant in regard to this convention.

such as is indicated in the quotation given above from Sir Courtenay Ilbert ; indeed, some advocates of international "labour legislation," whatever that means, were disappointed that the Treaty of Versailles, instead of forbidding overwork or underpayment, only set up an office. But clearly the setting up of an office was precisely what has been done in the establishment of the new Ministries of Labour in several states. The unique character of the quasi-Executive and the quasi-Legislature, the Governing Body, and the General Conference, does not concern us here ; for Part XIII of the Treaty also established an administration. The economic situation has reduced the effectiveness of the new system, but the officials have been performing tasks which are integrated with the work of the new Ministries of Labour in modern states. For example, the British Board of Trade Labour Department, and some Ministries of Labour abroad, used to maintain special sections for foreign information. Now the International Labour Office at Geneva provides most of this information for all Ministries of Labour. The publication of the two periodicals of the International Labour Office has done much to "clear the air" in regard to the effect of labour problems in any one country upon similar problems in other countries. The methods implied in the various conventions and recommendations do not introduce any new principle of government, for they are all in effect treaty agreements as to action *by* the states themselves. None of them set up organs to act *for* the states. But a new principle is implied in the presence of officials of the International Labour Office and of representatives of "labour" or employers at diplomatic conferences, such as those on the reduction of armaments, emigration, mandates, &c. These are signs in the international sphere of the development of co-operation between governments and other organized bodies, of which we have examples within states in the German Economic Council and the use of Trade Unions in Great Britain for administering the unemployment insurance.¹ There is a large issue here for the theory of international law in regard to plenipotentiaries, and in fact the British Foreign Office, in 1920, was much concerned to know what, in the signing of an international convention, was the position of a representative of Trade Unions or employers' associations. Perhaps the problem has been shelved.

¹ In my *Government and Industry* (1921) I attempted an analysis of this new form of administration.

Certainly there is no solution in terms of Renaissance sovereignty. The dominant theory in most Foreign Offices is still that of "actes d'autorité," and not of "actes de gestion." Indeed, the practice of diplomacy appears still to depend upon what psychologists call a "complex" in which sacred authority has a larger part than secular service.

The third organ of international life, the Permanent Court of International Justice, is outside our purview here, for its administrative officials are few, and their position in regard to the relation of the states Members is perhaps not important. But it is worth noting that these officials are part of the League system, and are paid through the League Commission on the Budget.¹

So far we have been reviewing the chief types of international administration. The increase in the amount of such administration is obvious, and the increase in the tendency for treaties to create such administration is also obvious. We may now turn to the problems which arise in this new form of government, and the issues in which they may affect international law.

First, the Secretariat of an international Executive, which meets seldom, and is of necessity more divided in sentiment than its secretariat, may acquire too much power without responsibility. A writer who was lately an official says: "As all national civil servants, the permanent officials of the League are no doubt an essential part of the governmental machine, but they are by no means its motor. It is true that they probably take a larger proportional part in the working of the machine than do national civil servants under ordinary conditions. This is due to the fact that whereas national governments are run by politicians who, while in office, usually devote all their professional energies to their task, the government of the League is in the hands of men whose main duties lie in other fields. The latter are, therefore, still more dependent on the co-operation and advice of permanent officials than the former."² Hence arise some political difficulties of the "Geneva atmosphere." At Geneva a policy may seem practicable, which seems quite impracticable in Paris or Rome; but this, of course, may be quite as much an argument against the slowness of imagination in Paris or Rome as against the imaginativeness of Geneva. In ordinary experience a civil servant often knows more of what is

¹ Cf. Fachiri, *Permanent Court of International Justice*, p. 52.

² W. E. Rappard, *International Relations as viewed from Geneva*, p. 161.

practicable than his responsible minister, and so a Geneva view may sometimes be more and not less practical than a London view. But our purpose here is only to state the problem, not to solve it. Clearly, ministers whose "main duties lie in other fields" are at a disadvantage.

Again, a new system may leave the old problems of national rivalry still unsolved. There is an increasing tendency to recognize that what is required in an international service is the competence of the officials, not a balance of national representation; but certain evidence, not to be stated here, seems to point to the fact that members of the Secretariat may be regarded as agents for a particular nation.¹ Each member of the Secretariat has his or her own national language and mental outlook, and although this may not be an obstacle always to international thinking, it may sometimes revive old hostilities.

Thirdly, the position of each responsible member of the Secretariat has two aspects. The League system does not destroy or diminish the importance of nationality. The national outlook of each member of the Secretariat is not, and should not be, lost. The Secretariat would be weakened if it had *no* language, or if it spoke *only* an international language. Internationalism should not involve the destruction of all the differences between nations. Therefore the Secretariat, while international in its interests, must preserve within itself *some* of the distinctions of nationality. The members must never be *déracinés*. And indeed one of the functions actually performed at Geneva by the Secretariat is to interpret the mind of one nation to the others. Thus before the Executives meet in Conferences or Commissions, the members of the Secretariat have done something to explain to members of other nations than their own the general attitude within their own nation. Unless the system is to work in a political vacuum, no convention can be effectual nor any policy successful which will not be validated by the "will" of the majority of the dominant group within the states Members of the League. Therefore the Secretariat has both to know and to interpret the diverse national outlooks, and to discover and express an inter-

¹ Complaints have been made as to the composition of the Secretariat of the League and the International Labour Office from the point of view of nationality. In the League office there are about 470 officials of whom 161 are British, including Dominion citizens, about 93 French, and about 100 Swiss. The Report on the Budget for 1926 (C. 619, M. 201, 1925) deals with representation of nations on the Secretariat (see p. iv, Miscellaneous questions).

national interest. This is obviously important for the drafting of international conventions. At least it saves time. In the old days a special conference had to be called for each proposed convention, and a "scratch" secretariat, unpractised in international intercourse, had to be collected. Let us recall, for example, the time and trouble which was necessary for the drafting of the conventions concerning the use of phosphorus in the making of matches and the night work of women. Now there is, as it were, a permanent drafting office, and it may be argued that something more than time has been gained.

PART III. SOME CONCLUSIONS.

The League system of international administration is part of a very much older and more extensive movement. In many different ways the forms of international life have been changing during the past century. Science, art, capital, and labour are organized internationally, with varying degrees of success. Political government, therefore, has been driven towards an international organization, and although we have not yet, and perhaps never shall have, an international legislature, we already have an international administration. Our international experience is recent and, therefore, one hesitates to theorize, but Professor Tout's volumes on *Medieval Administration in England* make one suspect that the state was built up out of administrative acts, not out of legislation. It would in any case fit in with the new psychology if the so-called "will of the people" were a late development due to acts in which no "general" will was present. How then if the "international mind" were to develop *after* and not before international government?

Thus several problems of political science arise in regard to the new forms of international administration, but some of these do not directly concern international law. For example, is this development a strengthening of bureaucracy? Will the citizen be still further removed from knowledge of what is done in his name if international arrangements between officials govern the situation? Again, will there not be more opportunity for sinister influence in the field of international administration? Or again, will the machine grind nothing but air? All these are questions which may be asked by friends as well as by adverse critics of the League, and the answers are not yet clear. But there are

other problems which concern international law more directly. For example, the experience of the Secretariat and of the conferences of ministers may lead to new methods of co-operation between states. It is a sign of the times that through the League machinery the convention respecting the transference of electrical power across frontiers should have been agreed. The suggestion may seem to many to be fantastic, but it should be remembered that Europe was made one not only by Roman law but by Roman roads. New transport and power systems have recently appeared. The motor has restored the road to importance, and the air-routes are mapped. May it not be that Europe will once again become one by means of the road? It could, however, only become so through the development of new forms of convention or agreement in connexion with the work of the Transit Section of the League.

Similarly, in regard to economic and "labour" problems, it is probable that the most effectual method of framing or signing conventions has not yet been discovered. Economic and "labour" legislation may differ fundamentally in character from legislation, for example, in regard to marriage or inheritance, and it is possible that some form of devolution or regionalism is necessary. But if so, then the International Labour Office cannot make the regulations of "labour" homogeneous over the whole world, but should advance in another direction.

The suggestion is that the form and scope of international conventions and agreements in regard to modern circumstances, such as those of transport, power, or labour organization, may depend upon the experience of international administration. It is perhaps possible to have conventions of a limited character between a limited number of states, but within a general international scheme. The collective guarantee, for example, may be a basis or framework for an agreement between a few states on a specific issue. The Locarno Treaties are not necessarily opposed to the system suggested under the Geneva Protocol of 1924. But the relation between the particular and the general in such cases may have to be worked out by administrative experience, and not by abstract discussion. That is the way in which, in the sphere of national government, the first unemployment insurance under the 1911 Act was worked into a larger scheme under the Acts of 1918-20. It is suggested, therefore, that the development of international law may be studied by

reference to the effects of administration upon the law within any state.

A further consideration of importance for international law is with respect to the meaning of sovereignty as affected by international administration. The problem of sovereignty is obviously too extensive for treatment here, and, therefore, only a suggestion may be attempted for the consideration of jurists. We are concerned here with "external" sovereignty only—not with the supremacy of the state in regard to its own subjects, but with the independence of a state in regard to other states. Now Renaissance sovereignty in this sense implied exclusiveness or segregation, as most candidly rendered by Hobbes, and there has been a tendency among such writers as Léon Duguit to assert that the League system is opposed to sovereignty itself. It would follow that sovereignty is limited in proportion as the League system is extended.¹ But this involves two false assumptions: (1) that sovereignty necessarily means Renaissance sovereignty, and (2) that law is a limitation of liberty, and organization a restriction of independence. But in regard to the first, monarchy does not necessarily mean Renaissance absolutism, nor does democracy necessarily mean mob-rule: and in regard to the second, the conceptions of liberty and independence implied are psychologically absurd and philosophically contradictory. We may waive the larger issues, however, for the obvious fact is that a government is very much more effectual if it is assisted by other governments. If government aims at promoting economic security and progress, education and health, clearly government is more successful in proportion as co-operation between distinct governmental systems is secured. Exactly the same is true in regard to the more primitive services of government—police and defence; but that is not yet generally agreed. If, however, we say that the essential characteristic of sovereignty is *power*, not exclusiveness, then an extension of power is not a limitation of sovereignty, and by power here is meant ability to perform functions. If this is true, then *actes d'autorité* are merely powers to perform some functions, and *actes de gestion* are powers to perform other functions. The state is a system of public service, as Duguit has very well shown. But the only way in which, given modern transport and com-

¹ Duguit says so in *Souveraineté et Liberté*, Ch. VIII, La Ligue des Nations, p. 126.

munication, any state can perform public services is by international co-operation with other states. That the League system supplies.

It follows that the League does not limit sovereignty, as law does not limit liberty. I am not less but more independent if I use the services of a shoemaker instead of making my own shoes, but of course in that sense independence does not mean isolation. If a word may be invented, "inter-pendence" is not dependence. It is to be hoped that this may not seem to be a mere playing with words, for it does indeed imply a philosophical view which is uncommon. So long as liberty is defined by negatives, as the *absence* of restraint, so long sovereignty will seem to be opposed to the League system. But modern sovereignty is the power of a state to function in regard to other states—to affect other states and be affected by them.¹ In that sense, sovereignty is extended by the League system, and the precise areas in which it is so extended are marked by the acts of international administration.

Whatever the solution of these problems, however, it is important for international law that the new systems of international administration should be studied. Indeed, the present situation is not the result of poetical dreams, but of an inevitable development in the art of government, and it is impossible, therefore, to understand even national government without studying the new forms of co-operation between governments. But treaties, conventions and agreements, which originate in the administrative experience of an international office, are likely to differ in some characteristics from the older forms of treaty. We are at the beginning of a new experience. The problems of the modern world with which international law is concerned are, of course, different from the problems faced by Grotius and his immediate successors. But something more than the problem has changed. There is a new point of view from which to see the problems and a new method for solving them. The new methods, however, are extensions into a new field of methods already well tried elsewhere. The machinery of the League is *part* of the machinery of government with which the

¹ Similar criticism may be made of the attack on "internal" sovereignty. Duguit in *L'État*, Vol. II, "Les Gouvernants et les Agents," goes so far as to conclude: "L'État n'est pas une personne souveraine"; but most of his arguments are against the "personality" of the state, not its sovereignty.

citizens of modern states are familiar. There is no gap or "empty space" between, for example, the government offices in London and Paris and the offices of the League at Geneva, for in actual experience the officials of the state-governments go to Geneva to meet and discuss issues with the League Secretariat, and the chief officials of the Secretariat travel to all the great centres of government. Not Foreign Offices only, but all the new administrative offices in modern states are in continuous contact through their officials, if not through their executive heads.

The situation may perhaps be interpreted by a simile. Let it be imagined that the machinery of government in all the modern states became more elaborate and more extensive during the later nineteenth century. The wheels and rods of the British machine extended so far that they began to come into occasional contact with the wheels of the French machine of government. The simile indicates that direct communication was beginning, even before the war, between the ministries of education and health in the different countries. The wheels of the two machines, then occasionally in contact, could not function well unless the next step was made. The next step was to use cogged wheels. The Secretariat of the League are the cogs, or if it be preferred, they are parts of the small cogged wheel which keeps the machinery of government in various states working "in gear." Thus, the League is not a super-state; it is the necessary extension of each state in the formation of a world system of government. The Secretariat is the natural and inevitable outcome of the increasing extent and complexity of modern government. And, as administration within the state is a source of new law and of new types of law, so international administration may affect the extent and character of international law.

WHAT IS PRIVATE INTERNATIONAL LAW ?

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It is not the purpose of this article to discuss questions of nomenclature or to consider whether Private International Law or Conflict of Laws, International Comity or Inter-municipal Law possesses the most merits as a title to a certain branch of legal science, or the ineptitudes of each or any of them. Too much ink and skilled dialectical reasoning have already been wasted in barren controversies on this matter—barren, because each suggested title conceals a somewhat different view of the content of the subject which it is desired to describe. Though the most elementary logic would seem to demand that a consensus on the limits of the subject must precede agreement on the appropriate title, juristic controversy seems largely to have ignored it. Moreover, treatises now abound on Conflict of Laws, international conferences have been held and conventions signed on Private International Law, and the terms have passed into current use as if there was no doubt about the subject which these titles indicate. Yet in reality it is still a vague and amorphous idea, familiar enough, but—so far as any consensus of opinion is concerned—quite undefined.

Efforts directed towards the analysis of legal science into departments have often been met with the criticism—not always ill-founded—that, even if successful, they possess but little value, for if the principles and rules can be ascertained, it is of little consequence into what pigeon-hole in the framework they are fitted. Yet, in this case, the work of the analyst is very necessary. In the first place, the implications of an international obligation on each state (which are so strongly urged in some quarters) to apply the body of principles covered by these titles, render it practically important to ascertain their extent. Secondly, the movement for codification in the region of Private International Law is so strong that any country may find itself confronted by an invitation to attend an international conference summoned for this purpose, and may also find itself under considerable

pressure of public opinion not to refuse it. At such a time uncertainty as to the proper scope of the subject is embarrassing.

At the present moment the codification of Private International Law is about to be considered at conferences both in Europe and America.¹ To serve as a basis for discussion at these two conferences, that distinguished jurist, Señor de Bustamante y Sirvén, a judge of the Permanent Court of International Justice, has prepared and published a draft code of Private International Law. The breadth of the range of subjects which this project includes is at first sight somewhat astonishing, but it is not, in fact, any wider than that claimed as the proper scope of their subject by very many European continental jurists in their treatises on Private International Law, and the actual contents of the works of Anglo-Saxon writers furnish, to some extent, an apparent support of this view. Codification is a process which an English Government always regards with some distrust and alarm, arising partly from a belief deeply rooted in the English mind² that judicial precedent is the best and soundest method of legal development, which on codification acts as a fetter,³ and partly from the great practical difficulty of the task—a difficulty which does not exist for the great majority of countries—of introducing a large piece of codified law into a common law system.

These objections, which are so to speak of an internal character (the external ones—formidable enough in themselves—which spring from differences of opinion between countries in regard

¹ In South America this subject has been considered at Pan-American Conferences since 1878, and was brought up again in 1923 at the Fifth Conference at Santiago de Chile, when commissions were appointed to study and draw up a draft code. The American Institute of International Law was asked to assist in the work, and appointed a group of four jurists, which included Señor de Bustamante. In 1924, at Geneva, the International Academy of Comparative Law constituted a commission with the same object. Señor de Bustamante is also a member of this commission.

² German writers of the school of von Savigny are, of course, equally opposed in principle to legislation (whether by international convention in the sphere of the law of nations, or by statute or decree in municipal law) as a method of law-making, preferring that the field should be left to legal science to work there unconfined. See, for example, von Bar, *Theory and Practice of Private International Law*, translation by Gillespie, 1892 ed., p. 10.

³ Cp. Phillimore, *International Law*, Vol. IV, p. 11: "It is a matter for rejoicing that it has escaped the Procrustean treatment of modern legislation and has been allowed to grow to its fair proportions under the influence of that science which works out of conscience, reason, and experience the great problem of Law or Civil Justice."

to the principles to be adopted, it is, of course, the aim of an international conference to eliminate or to reconcile) are greatly magnified in the case of Private International Law if the topic really includes—as this project of M. Bustamante's, for instance, suggests—matters which in England are commonly thought to belong to constitutional or criminal law, the law of evidence and procedure, public international law and procedural conventions between states for the reciprocal assistance of each other's tribunals.

For these two reasons a clear view of the proper limits of Private International Law as a topic seems to be of urgent importance.

The subject of the present inquiry is, therefore, twofold :

1. Is there a system of rules of Private International Law which, by the law of nations, it is already obligatory upon states to apply ?

2. What are the proper limits of the system of rules which can be described as Private International Law ?

Unfortunately, it is impossible to treat these two questions entirely separately, for writers constantly point to a given principle—included by themselves as part of Private International Law—which is certainly binding between states, and argue from that that Private International Law, as a whole, is obligatory.¹ Conversely, others would exclude from Private International Law other topics on the ground that they are part of Public International Law, and the two systems are mutually exclusive.

It must be admitted that the principles of Private International Law are principles which must—at any rate so far as the vast bulk of them is concerned—take their effect, if they are to take effect at all, through the decisions of the municipal courts of each country, and that consequently the courts of every country must, to a certain extent, develop their own national jurisprudence in this matter, which will naturally form the subject of treatises on Private International Law—treatises based on the practice of one country only. This fact does not, however, really provide any argument either way in considering the proper answer to the first of our two questions : for municipal tribunals are, from the point of view of the law of nations, merely one kind of national agent, for whose actions their country

¹ See note 1, p. 89 *infra*, for an example.

must accept responsibility, and a state cannot commit breaches of the rights of other members of the family of nations behind the cover of its own municipal law. A Prize Court is a municipal tribunal which creates to some extent, in connexion with the principles with which it deals, a national jurisprudence, which forms the subject of treatises such as those on English Prize Law. Yet it is beyond controversy that the questions with which a Prize Court deals are regulated as between state and state by rules binding by the law of nations, and if a Prize Court admits a principle into its own jurisprudence which is contrary to a generally admitted rule of the law of nations, diplomatic representations may ensue from the state whose subjects have suffered by a decision following that principle, and, if the question goes to arbitration, damages will probably be awarded against that court's national state.

The position is similar with respect to the privileges of ambassadors or the immunities of state ships, for both are undoubtedly secured by principles of the law of nations, yet must, under the systems of most countries, be given effect to by the action of their municipal tribunals. In cases of this kind, a state, if it would fulfil its obligations under the law of nations, must so order its internal affairs that the principles followed by its municipal courts in these matters do not conflict with those of the law of nations. There is an international law of diplomatic privilege as well as an English law.

Do the principles of Private International Law stand on the same footing? The fact that there are many and most important differences between the principles actually applied by the courts of various countries in matters within the scope of Private International Law is really irrelevant, for vital differences exist in Prize Law, and no one doubts that, as a matter of principle, the right of capture at sea is regulated as between states by the law of nations. It is not a matter with respect to which a state is left free to frame its municipal law as it pleases and to apply such a law in its courts in cases affecting foreign interests.

Are those matters which are regulated by the principles of Private International Law comprised within each state's exclusive sovereignty and, therefore, governed wholly by its own legislation, on which its own courts are entitled to pronounce the final word, or is there a body of rules of Private International Law the failure to follow any one of which on the part of a municipal court in a case

in which foreign interests are involved is an international delinquency, which might properly be the subject of diplomatic protests or proceedings before the Permanent Court of International Justice?

If a case were brought before the Permanent Court of International Justice, in which state A proved that in a given case the courts of state B decided a case to the prejudice of a national of the claimant by rejecting a principle of the Conflict of Laws, apparently accepted by every other country, would the court award damages to state A, or would it hold that the matter was within B's domestic jurisdiction? This is the test by which the former of our two questions must be answered. It is really the most important practical point. The form in which it is presented is more natural to an English lawyer, whose outlook the Austinian theory has permanently coloured, than to a continental lawyer.

If the answer is in the affirmative, an English lawyer would say that there was a system of Private International Law which was really International Law. This is the only sense in which he understands the word "international" in connexion with law.¹

In searching for the answer to the question, the views of certain writers, both continental and Anglo-Saxon, must be considered. With regard to certain of the former, however, a difference of point of view creates a source of confusion. The word "international" is commonly used by some continental writers in quite another sense. Being imbued with the ideas of Von Savigny, they do not consider the type of sanction behind a rule of law as of first-rate importance in any classification of law. Indeed for them, even in municipal law, a rule may be the law, though it is not recognized by any tribunal at all, if legal science finds that it alone is consonant to reason and justice. They employ the word "international" to characterize any rule or principle dealing with cases where more than one nationality is involved,² and then proceed to classify on the basis of the subject

¹ It is because he accepts no other meaning as permissible for "international," that Sir Thomas Holland, who does not think that there are any rules of Private International Law binding on states *inter se*, criticizes the name "Private International Law" as entirely inappropriate to describe a section of municipal law (see *Jurisprudence*, 13th ed., Chap. XVIII).

² It must not be supposed, however, that all continental writers adopt this point of view. It would be impossible to put more clearly, what is above, conveniently rather than accurately, described as the point of view of an English lawyer, than does M. Aubry in the following passage: "Si les conflits des lois étaient de véritables conflits internationaux, il est de toute évidence que l'arbitrage

matter dealt with. Take, as an example, a passage from von Bar's *Private International Law* :¹

"As a matter of principle, no objection can be taken to the conjunction of private international law with public (sc. international) law. There are indeed subjects which are common to both—e. g. the doctrines of allegiance and extraterritoriality, and on this ground it might seem desirable to treat them together. But in that case, private international law could on no account be represented as an entirely subordinate division of public law. It would be, as a matter of principle, correct to take up public law and private international law together under the description 'international law.' But in that case a division must be made into : 1st. the international law of states (public law) ; 2nd. the international law of private persons ; 3rd. international criminal law ; and 4th. the international law of process both civil and criminal."

The learned author then explains that on a ground of pure convenience, namely, the bulk of the two subjects, Public and Private International Law, it is best to treat them separately.

Now, in the above extract the following points may be observed : (i) that as a matter of principle 1, 2, 3, and 4 may be properly treated together, i. e. are not fundamentally different in character ; (ii) that the division between 2, 3, and 4 is apparently considered to be as great and no greater than that between any of these three and 1 ; (iii) there are certain topics common to both 1 and 2.

De Bustamante, in his draft, adopts a somewhat similar position, though he treats 2, 3, and 4 rather as sub-divisions, all forming part of private international law. He includes in his subject criminal jurisdiction, nationality, diplomatic immunities, extradition, and "requêtes" and "commissions rogatoires." The propriety of including these topics under the title "Private International Law" will be considered later ; it concerns the second of our two questions. It is sufficient to observe at the moment that some of these topics are also always to be found in treatises of public international law and are undoubtedly matters with respect to which there are rules binding on states *inter se* by the law of nations.

du juge ne pourrait pas toujours les clore. La sentence rendue ne terminerait que le litige à l'occasion duquel le conflit s'est élevé ; mais celui-ci subsisterait entre les états restés dans la coulisse, et, par suite, il pourrait faire parler de lui dans le monde, donner lieu à des négociations diplomatiques, devenir peut-être un *casus belli*" (*Journal du Droit International Privé*, Clunet, Vol. 28, p. 651). M. Aubry has the same views as to the use of the word "International" as Professor Holland, see Vol 27 of the *Journal*, p. 690, n. 1.

¹ Translation by Gillespie, 2nd ed., Edinburgh, at p. 6.

Yet neither von Bar nor de Bustamante consider that all the principles which they classify and treat under the title "Private International Law" stand on the same footing, in the sense that the neglect of any of them could be made the subject of a diplomatic protest or a good cause of action before the Permanent Court. They group together, however, some principles which could and some which could not. From the aspect from which their legal tradition leads them to regard things, this difference is not of fundamental importance. Yet it is an essential part of their doctrine that on all these topics there is a Private International Law which is not simply the positive law of any given state—a law which is not municipal law nor, in the sense that an English lawyer would use it, international law, though they call it international law.

This position, which is at first sight rather difficult to understand, is explained by von Bar¹ as follows :

"The same considerations also prove private international law to be an independent department of law; it is not, as Lorimer has recently affirmed, merely a part of the domestic law of each state. In the abstract, every state can determine its own legislation as it pleases; the effect of its laws upon legal relations which have any connexion with a foreign country, will be determined by the nature of the subject, i. e. by the requirements of an orderly and lawful intercourse, and by the respect which is due to the sovereign power of other states. The false impression that private international law is only the domestic law of each state, and that it is impossible for us to set up rules that are generally recognized for the intercourse that is nowadays carried on among civilized states, proceeds on the one hand simply from the fact that the courts of the different states, subject as they are to their own legislature, must follow the directions of that legislature as to their own jurisdiction, even when these are mistaken; and arises on the other hand from the extraordinary difficulty and doubt that belong to very many of its questions. In particular cases

¹ *Loc. cit.*, pp. 2, 3. De Bustamante's standpoint seems to be the same. On p. 11 of his introduction to his draft code he writes :

"Il faut concevoir le droit international privé comme l'ensemble des principes qui déterminent les limites dans l'espace de la compétence législative des États, quand il y a lieu de les appliquer aux rapports juridiques, qui peuvent être soumis à des législations différentes. Entendu ainsi, il se différencie du droit international public par son objet et par ses procédures ou modes d'action. Le dernier s'occupe de la vie extérieure de l'État comme membre de la société internationale, le premier des limites dans l'espace du pouvoir législatif dans son exercice national ou intérieur." On p. 31, speaking of the principles of Private International Law as a whole, he says: "Chaque pays cependant, a le droit indéniable de déterminer conformément à ses règles internes, la qualification des diverses institutions ou des rapports juridiques, pour les placer dans le groupe de lois qui convient, comme il a le droit de formuler cette qualification au moyen d'accords internationaux"—showing that he does not regard them as binding by the law of nations.

which happen to fall under the jurisdiction of the courts of this or that state, these courts will recognize only that theory of jurisdiction in international questions which is peculiar to the law of their state; and just because of the doubts and difficulties of particular cases, we find that many blunders and encroachments by this or that system of law, and this or that state authority, are acquiesced in in the intercourse of nations, that is to say so far as public law is concerned. But if it can be shown that these mistaken decisions on jurisdiction are errors and blunders, then in the end the pressure of the general conviction on the subject, working along with the might of commercial intercourse, will force them out of the way."

In a note he adds :

"In the most extreme cases, e. g. in cases where an undoubtedly perverse application of the law of any particular state would result in the direct spoliation of foreigners, it may be that the remedies of public law will be used against such stretches of competency. But this is not easily brought about, because, as Lorimer himself observes, the jurisdiction and legal system of every state is entitled to the presumption of honest intention in these matters."

In another place he says ¹ :

"No doubt each individual state may to a certain extent permit itself to deviate from the rules of international law, and these deviations, however perverse they may be, are for the time positive law for that state, which can be carried out as far as the sphere of its power extends. But capricious deviations of this kind generally bring great disadvantages in their train, even for the state which allows itself to practise them. They are not truly law, any more than the deviations from the law of nations in its technical sense, i. e. public international law, which a state may allow itself to practise, are law, although it may see that these deviations are carried out, so far as its own power extends, by its officials and official machinery against private persons."

At the bottom of this doctrine is the view that law is made, not by the legislature nor yet by judges and decisions, but by juristic writers who, by reason of a reputation founded on their intellectual attainments, possess a *ius respondendi* as interpreters of that sense of justice which, in the view of these writers, is innate in the community and is the source and sanction of all law. A perverse principle adopted by a national legislature or municipal court will in the end always give way before the reasoned denunciation of the jurists expounding the law. The difference between writers such as von Bar and writers of the positivist school, such as Westlake or Dicey, thus emerges clearly to be one of the use of terms merely. Any English writer will admit that an awkward principle in a national system will in the end generally disappear either by means of the decision of

¹ *Loc. cit.*, p. 77.

a superior court or an enactment of the legislature. He will readily admit that the most potent agency towards this result is the *communis opinio* of learned writers, but to him the principles embodied in the decisions of the courts, awkward or perverse as they may be, are the law, and the principles of justice found enshrined in the writings of jurists are not law but sources from which law is drawn.

To return therefore—after this digression—to the first of the two questions proposed as our inquiry, von Bar, de Bustamante, and other writers of their school of thought¹ really support a negative answer, i. e. that there is no system of rules of Private International Law at present existing with obligatory force between nations. In this view they are in agreement with Westlake, Dicey, Story, Wheaton, Foote, Baty, and practically all Anglo-Saxon writers (except perhaps, Wharton,² whose position on this point is not developed at length). These latter writers, however, tend to express this opinion by saying, as Westlake puts it, “the place of private international law is in the division of national law.” Unlike von Bar they do not call international law principles which are not binding as between states by such sanctions as the law of nations possesses, and the dictum means that the only place where these principles are found in a form which can be called law is in the various municipal systems.

This view is shared by a number of eminent French writers, beginning with d’Argentré and including Foelix and M. Aubry. The latter writes :

“Un droit international, c’est un droit qui a pour objet les rapports des États, ou qui tout au moins, trouve dans ces rapports son origine. Tout le monde sait bien, cependant, que le droit international privé a pour objet des relations individuelles, et que, réserve faite de quelques traités conclus entre certains États seulement, chaque législation règle ces relations à sa guise.”³

This view is, however, by no means unanimously held. The eminent Belgian jurists, MM. Laurent and Rolin, Diena and the writers of the modern Italian school, and the French Professors Lainé and Despagnet, maintain the contrary thesis, of which,

¹ M. Weiss, in his *Droit International Privé*, and M. Maurice Travers, in his work on *Droit International Pénal*, seem to hold the same view.

² In his *Conflict of Laws* (2nd ed., 1881) he says : “The law of nations is part of the Common Law and Private International Law is part of the law of nations.”

³ *Journal du Droit International Privé* (Clunet), Vol. 27, at p. 690.

perhaps, M. Pillet, the learned French barrister, is the protagonist.

He says : ¹

“ La distinction qui sépare ces deux branches du droit international n'est pas aussi considérable qu'on se l'imagine et que, si notre science a pour objet des rapports du droit privé, elle emprunte ses lois aux relations existant entre souverainetés. C'est à dire, au droit public international. Toute tentation faite pour isoler le droit international privé du droit international public contient en germe une erreur de méthode . . . Donc les questions du domaine de notre science touchent toutes aux rapports des souverainetés : entre elles et ses préceptes n'ont, quant à leur nature, rien que les distingue des lois du droit international public. Tous les conflits des lois sont conflits de souverainetés.”

The last sentence of the passage quoted contains the key to his whole theory. Each law is regarded as an expression of the sovereign will of the state whose law it is.

The principle of Private International Law, that the status of a Frenchman, even when he is abroad, shall be ascertained by reference to French law, is interpreted as meaning that it is within the sovereign jurisdiction of France to decree what his status shall be and it is a violation of French sovereignty if that question is submitted to the expressed sovereign will of any other state. It is a violation similar in kind to, though less in degree than, the assumption of jurisdiction over a foreign sovereign or ambassador. The rules of Conflict of Laws are, in his view, in fact merely rules which determine the limits of each state's sovereignty.

Pillet does not include criminal law in his subject, and considers questions of the acceptance of jurisdiction by the courts in any given case as of minor importance. It is, therefore, in the matter of the law to be applied that his theory must be tested. No doubt the main principle to which this doctrine is most firmly wedded is that the national law must determine an individual's status or capacity, and in this connexion it does not at least sound quite absurd, but an equally important part of the subject deals with the law which must be applied in the interpretation of contracts. Suppose a contract made by A and B in France for performance in England. It is open for A and B by express conditions to submit their contract to be governed by either French or English, or even Japanese, law, and thus on this theory to add to the sovereign rights of the King of England

¹ Pillet, *Traité Pratique de Droit International Privé*.

or detract from those of the French Republic. Supposing they do neither expressly and it is a question of interpretation to discover their intention, which they have not clearly expressed. If the principle of the *lex loci contractus* is applied instead of that of the *lex loci solutionis*, have the sovereign rights of Great Britain been infringed, as being the state in whose sovereignty it lay to declare how this contract should be interpreted if the two individuals have not expressly said that France or Japan shall have that power? M. Pillet must say that this is so, but there is an unreality about such a supposition that in itself invites incredulity, even if it were based on some ground more solid than a merely logical deduction from the terms of a cherished definition. This does, however, seem to be the foundation of the theory. The definition of the rules of Private International Law as rules for determining "les limites dans l'espace de la compétence législative des Etats," or some similar phrase, has gained an almost universal currency in France, and this theory seems an example of the danger of building up a fabric of deductions from the words of an accepted definition without sufficient regard to the facts of the situation.¹

Now no such theory is necessary to explain the existence of principles of Private International Law or the application in certain cases of the law of one country in the courts of another. A sufficient explanation can be found in the practical necessity of doing so if justice is to be done in the interests not merely of aliens but also of nationals.

Other authors, however, while maintaining that the principles of Private International Law rest on the sanctions of the law of nations, refuse to follow M. Pillet into the logical deductions of his theory. In a recent treatise by a judge of the Egyptian Mixed Tribunals the following view is expressed: ²

"Suivant une opinion qui compte d'éminents partisans dans la doctrine française, italienne, allemande, le droit international privé a pour sujets non les particuliers mais les États dont il détermine les droits et les devoirs réciproques en vue de régler les rapports juridiques d'ordre privé, il forme donc avec le

¹ Cp. the definition given by Dicey, *Conflict of Laws*, p. 3: "Principles governing the extraterritorial operation of law or recognition of rights." The idea is the same in both definitions, but the phraseology does not suggest any delimitation of the sovereignties of different states—the suggestion of which in the French definition has stimulated so strongly the imaginations of some French writers.

² *Nature, Objet et Portée des Règles de Droit International Privé*, par Pierre Arminjon (Librairie de la Société du Recueil Sirey, Paris, 1920), pp. 2 and 5.

droit international public une des deux branches du droit international . . . Il est en outre exact que la violation systématique par les représentants d'un État des règles de droit international privé qui forment une coutume admise dans tous les pays pourrait engager la responsabilité de cet État vis-à-vis des autres, suivant les formes et les sanctions indiqués par le droit international public. On ne saurait aller plus loin.

“Dire que lorsqu'il applique une législation autre que celle de son pays, lorsqu'il exécute un jugement rendu dans le ressort d'un autre système juridique que le sien, le juge délimite les souverainetés de deux États, c'est faire une affirmation qui est non seulement dépourvue de démonstration et sans utilité pratique, mais qui ne concorde en aucune façon avec une bonne partie des situations en vue desquelles elle a été imaginée.”

Here, at any rate, he professes to treat the question from a practical point of view.

On what theory does this obligation to follow these principles now rest? The hypothesis must be that each state is bound towards the rest to treat their nationals in accordance with these principles.

Where is the “démonstration” of such an obligation in the history of international relations?

The central and essential part of the whole system is the choice of law. Is there record of a single diplomatic protest or international incident based on the failure to observe a principle of Private International Law concerning the choice of law? In the last century a case came before the English courts in which it was proved that the courts of Louisiana had given a judgment respecting property in a ship in which the rights of a mortgagee duly acquired in accordance with all the formalities of English law were ignored. The English courts refused to recognize this judgment, and in effect reversed it. Neither Great Britain nor the United States are, as a rule, slow to protest against violations of the law of nations with respect to their nationals. Yet there is no report of any protest on either side. In the words of M. Aubry :¹

“Malgré toutes les solutions arbitraires ou fantaisistes qu'ils ont pu recevoir, les conflits des lois n'ont jamais provoqués même le plus léger froncement de sourcil d'un diplomate.” He continues (meeting an argument of M. Pillet) : “A cela, on répond qu'ils ont pas une gravité suffisante pour entraîner la guerre. De minimis non curat praetor. Je pourrais faire observer à mon tour, que bien des guerres ont eu les plus futiles motifs. Mais passons condamnation là-dessus. Ce qui reste inexplicable, c'est qu'un différend international puisse exister sans se manifester d'une façon quelconque, qu'en un mot les États

¹ *Journal du Droit International Privé* (Clunet), Vol. 28, p. 651.

puissent se quereller sans le savoir . . . Ce qu'il faudrait montrer, c'est que tout conflit de lois se traduit nécessairement par une tension, si légère soit-elle, dans les relations des États en jeu, et l'on avouera bien que la question ainsi formulée ne mérite même pas l'examen."

It seems, indeed, possible only to draw one conclusion—that there is no system of Private International Law, as a whole, recognized as binding by the law of nations.¹

Let us turn then to the second question of our inquiry : What are the proper limits of this branch of law called Private International Law ?

Since this is a question of legal analysis one cannot start better than with a definition of the subject by a writer on general jurisprudence, whose scope is the whole realm of law and whose aim is to classify and analyse it into proper divisions. Professor Holland, to take an eminent example, describes it under the heading "Application of Law" and says it consists of the rules which provide the solutions in the various circumstances of life to these two questions : "What state has jurisdiction to apply the law to the facts ? What law will it apply ?" The subject, according to him, consists of two parts only, the first dealing with questions of Jurisdiction and the second with the Choice of Law. While refraining from entering on any discussion of the titles given to the subject, it is worth observing in passing that amongst continental writers the term "Conflict of Laws" is commonly used as a description of the second part of the topic merely. Professor Dicey, though he is dealing with the whole subject, adopts the title "Conflict of Laws" : nevertheless, he follows exactly the divisions suggested by Professor Holland, and his book is divided into two parts on this principle.

His definition of his subject is to the same effect :

"The second part of the law of England consists of rules, which do not directly determine the rights or liabilities of particular persons, but which determine the limits to be exercised by English courts as a whole and also the choice of the body of law, whether the territorial law of England or the law

¹ It is perhaps necessary before passing on to the second part of the subject to note the view of Sir Robert Phillimore, that the principles of Private International Law are founded on "international comity." The theory is so far divorced from historical fact that it need not be dealt with at length. The principles of the English jurisprudence were built up by the decisions of judges deciding the rights of parties in cases tried before them. It is fantastic to imagine English judges, when they admitted the applicability of a foreign law, as having been influenced by considerations of courtesy towards the sovereign of the state whose law was applied, and, if it were true, it would not be to the credit of English justice.

of any foreign country by reference to which English courts are to determine the different matters brought before them for decision.”¹

Now, in a definition of the subject-matter there is really almost unanimous agreement between the jurists of all countries and schools. One may take for comparison that of von Bar: “Private International Law determines the applicability of the legal systems and the jurisdiction of the agencies—the court and magistrates—of different states in private legal relations.”² Professor Westlake’s is the same.³ So is that of M. Pillet, to which I have already referred. He, however, considers the first part to be of very minor importance, and sees little objection to a court entertaining any action which the parties bring before it so far as questions of private international law are concerned. Other continental writers go further and do not include questions of jurisdiction in their subject at all. This is the position of Dr. Asser the Dutch jurist and president of the first European conference on this subject in 1893. He writes:

“On appelle droit international privé l’ensemble des principes qui déterminent quelle loi est applicable, soit aux relations juridiques entre personnes appartenant à des États ou territoires différents, soit aux actes faits en pays étrangers, soit dans tous les cas où il est question d’appliquer la loi d’un État dans le territoire d’un autre État.”⁴

This is, therefore, a narrower limitation. In taking for our purpose the twofold definition we should be, therefore, by common consent, in no danger of adopting too narrow a view of the subject.

Yet if the treatises of learned authors on Private International Law are criticized in the light of this definition it will be found that one and all include matters which cannot be brought within its limits. To begin with a striking instance, Dicey, Westlake, and Foote, whose object is to expound the jurisprudence of the English courts, all include in their works expositions of the principles of British nationality law, and Pillet those of the law governing French nationality. Von Bar and Weiss treat at great length what they consider are the principles which should govern nationality laws in general. Now the

¹ Dicey, *Conflict of Laws* (3rd ed.), at p. 4.

² *Loc. cit.*, at p. 1.

³ *Private International Law*, p. 4. He says: “Private International Law furnishes the solutions to those questions in which it is sought in what jurisdiction an action ought to be brought and by what national law it ought to be tried.”

⁴ French translation of Rivier, Paris, 1884.

nationality of a given individual is undoubtedly, at any rate according to the principles adopted in many countries,¹ a most important factor in determining by what law certain facts shall be governed, and rules which prescribe what matters shall be regulated by the law of a person's nationality are unquestionably rules which determine the choice of law and come within the second branch of the subject.

But can the principles enacted by Great Britain or France for the acquisition of their respective nationalities be rules of the Conflict of Laws? If there were general rules in existence (like the principles worked out by von Bar or Weiss) prescribing the acquisition or loss of all nationalities, they would form valuable additions to Public International Law, forming general limitations to the sovereignty of every state. Yet, as all writers on Public International Law agree, there are no such rules and each state, within certain very wide limits, is free to adopt what rules it pleases for its own nationality, of which the existence of individuals of multiple or no nationality is the result, and there is almost equal unanimity to the effect that at the present time it is impossible to hope that any such rules can be arrived at by common agreement.² Therefore, for every nationality there is a separate system of rules. Since, however, a French court is just as likely—in order to determine what law to apply—to have to decide whether a given person is a Dutch national, as whether he is a French citizen, then if French nationality law can with propriety be included in a treatise on French jurisprudence relating to Private International Law, the treatise should logically also include Dutch nationality law, and indeed the nationality law of every other state. No author, however, attempts so large a task. Yet logic demands all if any.

Moreover, nationality law is part of the constitutional law of every state, and in treatises on such topics will invariably be found there. The rules of constitutional law are—to use the favourite term—“*d'ordre public*” or “*d'ordre public international*” and classed amongst those rules which over-ride rules of Private International Law.

¹ Anglo-Saxon writers and those of countries which prefer domicile as the criterion for determining the law of personal status have even less excuse for including nationality laws in their treatises.

² De Bustamente recognizes this, see p. 32 of his introduction to his draft code.

By their very nature, therefore, they fall into a category of rules which must be different in and peculiar to each state, and can find no place in a system of rules which, in theory at any rate, in contra-distinction to the purely territorial law of a country, can and should be more or less the same in every state and are considered pre-eminently those which must be worked out by legal science.

The foregoing are perhaps practical considerations rather than theoretical arguments. But it is the fact that theoretical arguments lead to the same conclusion. The rules of French or British nationality are not principles which either determine when a French or English court should exercise its jurisdiction or what law it should apply to any case, and are outside the scope of the definition.¹

Another topic which can frequently be found discussed in treatises on Private International Law is the "Status of Aliens." Pillet, for example, gives it a whole section of his book under the title, "La Condition des Étrangers" or "Les droits des Étrangers." He describes it as follows:² "Quels sont les droits dont jouissent les étrangers en France et quels sont ceux dont ils sont privés en leur qualité d'étrangers."

Do the rules which determine the rights of aliens in France throw any light on questions of the choice of law? No, clearly not. M. Pillet, indeed, expressly says so: he explains that this question must always be answered before questions of conflict of laws arise. Do these rules assist in determining when the French courts should exercise their jurisdiction? If amongst the disabilities of aliens by French law there was an incapacity to sue or be sued, such a rule might be relevant on the question of jurisdiction, but that is not so in French or any other system of law. Some countries refuse to allow their courts to entertain actions between two aliens or in certain sets of circumstances of which the foreign character of either of the parties may be a relevant fact. These, again, are certainly rules respecting jurisdiction, but they are not rules respecting the rights or capacity of aliens, and are not dealt with under that heading.

¹ On the other hand rules, determining the course to be followed by a court when presented with facts which must be determined by the law of a person's nationality and a person of double or no nationality, are certainly legitimately part of Private International Law, and de Bustamente is justified in including them in his draft code.

² *Loc. cit.*, p. 310. Asser also includes it, *loc. cit.*, p. 39.

The answer is that the status of aliens has nothing to do with jurisdiction.

This topic is outside the definition of Private International Law, and M. Pillet himself almost sums up the reasons which make it particularly unsuitable for treatment as part of this subject.

He says that this is a question which is decided exclusively with reference to the national law of each state, and that subject to the microscopic limits imposed on it by Public International Law and to its obligations by commercial treaties, it is within the discretion of each state to accord any rights that it pleases.

In a municipal system the rules which prescribe the rights of aliens are rules of constitutional law (d'ordre public international), and consequently on that ground unsuitable to form part of Private International Law. In their international aspect they belong to Public International Law. Their treatment as part of Private International Law either proceeds from or leads to a mental confusion of two different questions: (i) what is the capacity of aliens as a class? and (ii) by what is the personal capacity of X, an individual alien, to be determined? It is an instance of the regrettable¹ tendency of writers to conglomerate into Private International Law everything which has anything to do with an alien.² This tendency in writers like Asser³ or

¹ This confusion was so much present in the minds of the jurists who attended the private law conference at The Hague in 1901 that Articles 1 and 2 of the convention on marriage drawn up in 1902 actually create a right for aliens to be married in a foreign country in certain circumstances, instead of merely laying down rules defining the law by which the capacity of the parties or the formalities of the ceremony should be determined. Pillet, moreover, uses this topic, wrongly included by him as part of Private International Law, as an argument that Private International Law as a whole is obligatory upon states *inter se* by the law of nations.

² De Bustamante (p. 13 of the introduction to his code) practically claims this in terms: "Le droit international privé ainsi conçu et nettement distinct du droit international public, peuvent et doivent y rentrer toutes les règles applicables aux effets et à la portée de la loi nationale au dedans et au dehors du territoire vis-à-vis des étrangers et des nationaux, non seulement dans l'ordre civil et commercial, mais aussi dans l'ordre politique, administratif, pénal et de procédure."

Continental writers are not alone guilty of treating the status of aliens as part of Private International Law. Thus Foote's *Private International Law* (1926 ed., p. 50 et seq.) treats this question very fully. Westlake does not; nor does Dicey. The latter, however, treats as an exception to his rule that no class of persons is as such excluded or exempt from the jurisdiction of the court, the disability of enemy aliens in time of war to bring an action. Though at first sight this seems excusable as appertaining to the question of jurisdiction, in fact this rule has no more to do with the principles of Private International Law than a rule that a certified lunatic or an outlaw cannot bring an action. It springs from entirely different considerations, being a rule based on public policy in time of war.

³ Asser, *loc. cit.*, at p. 39.

de Bustamente, who are concerned with a Private International Law common to all states, leads them to lay down as an integral part of their subject rules defining what rights an alien should possess in a foreign country. The latter, for instance, makes the complete equality of nationals and aliens in the matter of all rights, except the rights of voting or taking part in the government of the country and of diplomatic protection abroad,¹ a fundamental principle of Private International Law. Rules respecting the status of aliens are, however, rules which "directly determine the rights and liabilities of persons," and, as Professor Dicey in the definition already quoted says, such rules are outside the proper limits of the subject, whose task it is only to determine the law in which these rights shall be sought.

Nearly all writers on Private International Law² include in their treatises rules with reference to jurisdictional immunities of foreign sovereigns, public ships, or diplomatic representatives, sometimes dealt with under the title "extritoriality." Broadly speaking, the gist of these rules is that these persons may bring an action just like any ordinary individual, but cannot be sued (or prosecuted) unless they or their sovereign consent to this exercise of jurisdiction. The alleged justification for considering that these rules are part of Private International Law is, therefore, that they are rules defining the cases where a court should exercise jurisdiction. So in a sense they are, but their whole basis is the privileged position of the persons concerned, and they belong, with the rules respecting infants or lunatics, to the law of persons, where they will be found in any analytical treatise. Their whole character depends on considerations entirely different from those on which the rules of Private International Law respecting jurisdiction are based, and there is no special convenience in treating them with these rules since they are part of the purely "territorial law" of each state and will be found fully treated in treatises on the appropriate divisions of any municipal system included in the law of persons.

In their international aspect these privileges are secured by the law of nations, of which they are a part. They are not, it is submitted, a part of Private International Law.

There is another topic which is frequently found treated as

¹ Draft Code, introduction, pp. 17-19, and Draft Articles 1 and 2.

² See, for example, Dicey, Westlake, Foote, von Bar, de Bustamente.

part of Private International Law, without any just claim to be part of the subject, namely, the assistance which the tribunals or authorities of one country commonly render for the benefit of courts of another, under Letters of Request or Commissions rogatoires, such as the service of writs or processes emanating from the courts of the latter on persons within the territory of the former or the obtaining of evidence from such persons for use in proceedings in courts of the latter.

It is not necessary to labour the point that such a topic does not come under either of the two headings of our definition. No obligation by the law of nations exists to perform such services, but they are generally rendered by one state to another. If "comity" is ever an appropriate word to apply to the practice prevailing in any sphere of international relations, it is so when these services are rendered in the absence of an international convention.¹²

We come last to the topic of criminal law. It is perhaps rather difficult to decide whether this topic is or is not strictly speaking part of Private International Law, and there is a wide divergence of opinion.

It is universally accepted that no state should apply in its courts the criminal law of another state.³ Therefore, in criminal law only one question arises which can be expressed equally well in two ways (a) what court has jurisdiction in these circumstances? or (b) by what criminal law ought these circumstances to be governed?

¹ Cp. Pillet, *loc. cit.*, at p. 17. He recognizes that it is not strictly part of the subject. De Bustamente, however, includes this topic in his draft code. In the same way Dicey is dealing with matters strictly outside his definition when he deals with the effect of an English judgment abroad and the registration of English judgments for execution in Scotland or Ireland, or in parts of the British Empire under the Administration of Justice Act.

² Señor de Bustamente inserts in his draft code articles respecting the methods of proof of foreign laws, which shall be admitted in the courts of each High Contracting Party, including an obligation on the Government of each, if requested, to transmit an official statement of its law on any given point. Methods of proof are part of the law of evidence and procedure, and by a clear principle of Private International Law must be regulated by the *lex fori*. To go behind this principle is to go outside the proper scope of Private International Law. The furnishing by Governments of official statements of their laws for the purpose of foreign legal proceedings, comes within the class of things regulated by international comity, like other methods of assisting a foreign tribunal. This particular request, however, is one with which it is contrary to the practice and indeed outside the power of many Governments to comply.

³ See, for example, Travers, *Droit International Pénal*, Vol. I, p. 12; and Bustamente, Draft Article 304.

De Bustamente, for example,¹² argues strongly that the rules on this subject are rules of Private International Law. He treats the question as simply being a choice between two alternatives—whether these rules are part of public or private international law—and argues that they are better classed with the latter because otherwise Public International Law will contain at the same time rules of such a widely different character as “the laws of war applicable between two states, and the punishment of individuals who have forged the national money on foreign territory.” Now there are certain principles binding on states *inter se* by the law of nations with respect to the limits of a country’s criminal jurisdiction over aliens, and, therefore, these principles are, from the point of view adopted in this article (which, as explained above, is not quite the same as that of Señor de Bustamente), part of Public International Law which comprises all legal principles binding generally on the whole family of nations *inter se*, though they may be of widely different character. The conclusion has already been reached, that Private International Law only exists in municipal law. Municipal law, however, contains many principles which are merely the counterparts of principles of the law of nations, such as the municipal rules relating to immunities of diplomatic agents. The question, therefore, which remains is this: Are those principles of municipal law, which prescribe the limits of the jurisdiction of the national courts in criminal matters, part of that branch of municipal law which is called Private International Law? De Bustamente’s arguments have no bearing on this question. Nevertheless, these principles are naturally very closely bound up with questions of extradition, and de Bustamente is clearly right in one sense when he says: “L’extradition n’est autre chose que le moyen d’amener le délinquant devant son juge compétent pour qu’il soit possible de lui imposer la peine fixée par la loi tenue, elle aussi, pour

¹ Introduction to his draft code, p. 14 et seq.

² Von Bar’s view is the same, *loc. cit.*, preface, p. x: “I cannot share the theory, which certainly has a large measure of support, that criminal international law belongs to another sphere of ideas altogether. I am rather inclined to the view of one of the most recent of French authors (Lainé), that private and criminal law, including the law of procedure, are bound up with each other by the consideration that the object to be attained is to settle what is the treatment which the law should mete out to the individual, who is in the midst of a foreign legal order, or more accurately, to settle the jurisdiction of the instruments of law set up by the organization of different states over individuals and their rights.”

compétente.” But even if that be so, extradition is equally clearly outside the scope of the definitions of Private International Law, and de Bustamente is again incorporating matter strictly outside the subject in including extradition in a code of Private International Law. Extradition belongs to the category already mentioned of services rendered by one state for the benefit of the courts of another state. It is generally regulated by treaty, and in other cases, if it is granted, depends upon comity.

The general grounds for including criminal law in Private International Law are, however, clear enough. The principles on which the jurisdiction of a criminal court are limited in “international cases” are at one and the same time principles of jurisdiction and choice of law, and come within the wording of the definitions we have adopted. Nevertheless, it is more common on the Continent to treat the principles of jurisdiction in criminal matters, together with extradition, quite separately, under the title, “Droit International Pénal,” for the reason principally that criminal law is part of public law, and the division between public law and private law is too great to admit of their being grouped under one head. In the view of some writers it is expressly excluded by the word “Private” in the title. It is particularly unsafe to base any arguments upon the words of such a contentious title,¹ and the purely analytical argument, based on divisions into public and private law, does not by itself sound very convincing. The subject seems hardly to have been considered by English writers, and the principles of English law have to be traced out by following case references in text-books on criminal law.

On the Continent, however, it has received no less attention than the Conflict of Laws. Like the Conflict of Laws it has been considered from two points of view—that of various national

¹ For instance, Westlake (*loc. cit.*, p. 5) adopts quite a different meaning for the word “Private”: “. . . that department which treats of the selection to be made in each action between various national jurisdictions and laws will not unreasonably be called international law, distinguished by the epithet *private* from the international law which prevails between states and which may be distinguished as *public*. Hence in this subject the force of the term private is independent of any classification of national law into public and private. Those classifications, of which several have been proposed, generally assign criminal law to the public branch, but the question of the principles on which treaties for the extradition of criminals ought to be framed, being intimately concerned with the question in what national jurisdiction a criminal ought to be tried, is not separable from private international law as here understood.”

jurisprudences and that of what is or should be the universal jurisprudence in these matters¹; in the latter case the authors in general pay no particular attention to the existing principles of the law of nations on this subject, or to developing those principles.

It is plain, however, on even a cursory perusal of such works that the whole set of principles and considerations by which jurisdiction or choice of law in criminal matters is said to be governed is entirely different from those postulated in the realm of private law, and that if the two branches of law are treated under the heading of Private International Law the title and the definition will be their only point of connexion.

The preferable view seems, therefore, to be that the principles of "Droit International Pénal" (no English term seems to exist) are not part of Private International Law. In so far as they are developed in any system of municipal law they form a separate topic in themselves. For the rest they are part of Public International Law.

This concludes a list of some topics which are sometimes (but wrongly) included as part of Private International Law. The true answer to the second question proposed—"Of what does Private International Law consist?"—is, it is submitted, simply this. "Private International Law consists of principles of private law which determine (i) in what circumstances the courts of a country have jurisdiction to pronounce judgment; and (ii) the law which they must apply in deciding the different matters upon which they have jurisdiction to pronounce, *and of nothing else.*"

When all the topics which are not properly part of Private International Law are excluded, it does not appear that amongst what remains there is anything which as between states is regulated by the law of nations. Private International Law is, therefore, not only municipal and not international law, but it treats only of matters which are, by the existing law of nations, within a state's exclusive sovereignty to legislate upon as it pleases. This conclusion rests on the hypothesis that the definitions given by the writers are right and the liberty they have assumed in freely interpreting them is wrong. This may appear to be a dogmatic assertion. What justification is there, it may

¹ This is the point of view of M. Maurice Travers, who treats the subject in six volumes.

be said, for maintaining that writers have wrongly interpreted their own definitions, or rather for declaring that the definitions are right and the views of writers expressed in their choice of subject-matter is wrong? Both rest upon the same authority—the writers themselves. What sanctity is there in a definition? Has not the danger of founding too much on the wording of definitions already been insisted on in this very article? Again, what is to be served by taking the narrow analytical point of view if practical convenience is served by also treating topics which, if strictly not part of the subject, are bound in practice to be found together with it? The view of the writer is that convenience is not served by treating the topics which have been discussed above as part of Private International Law, but that confusion has resulted from so doing, and further difficulties will probably result in the future. For insisting upon the accuracy of the definitions, in cases of conflict, no great reliance is placed on the fact that writers, while unanimous in their definition, are apparently at variance in their views on the choice of subject-matter, though this is significant.

The real justification which is pleaded is this. The body of principles which are covered by a strict interpretation of this definition possess a characteristic which is not shared by any other branch of law. That characteristic is not possessed by those topics whose inclusion as part of Private International Law has been criticized above.

The general aim which underlies this body of principles is that which Dicey adopts as his first General Principle, “the recognition and enforcement of rights duly acquired under the law of any civilized country.” Its aim is not the uniformity of law in general; on the contrary, this system is the *modus vivendi* by which purely territorial systems with all their peculiarities and national characteristics can exist side by side. The ideal, to which it is working is that no two municipal courts shall be forced, by the systems of law which they apply, to give different judgments on the same state of facts. To achieve such an ideal it is not necessary that the purely territorial systems of law of different countries shall approximate to each other in any way, but merely that their systems of Private International Law shall be the same.

It is in conscious or unconscious recognition of this ideal that judges or jurists on whose shoulders falls the task of moulding

their nation's laws attach and have always attached in this branch of law importance to the practice of other countries, with the result that there exists at least a greater approximation to uniformity between national systems in this than in any other branch of law. To realize this aim it is not necessary to evolve anything more than generally accepted rules respecting jurisdiction and the choice of law. Private International Law, properly conceived, never directly creates legal rights or liabilities: that is the function of the purely territorial branches of law. Hence, it is not like the latter, a creation of the national consciousness which in its development must be free to follow the national genius. It can, therefore, much more easily be moulded in sympathy with external thought and influence.

Extend the system outside these strict limits and at once elements are introduced to which entirely different considerations apply—nationality, the status of aliens, the law of evidence, extradition, and the rest, with the result that the clear cut nature of the subject and its definite, limited aim is lost in the morass of unification of law as a whole, and progress is checked.

The best hope for Private International Law to become international is for it to be confined rigidly to its proper limits.

NATIONALITY IN MANDATED TERRITORIES DETACHED FROM TURKEY

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THE ratification of the Treaty of Peace with Turkey which was signed at Lausanne in June, 1923, but did not come into force till August 6, 1924, made it possible at long last for the nationality of the inhabitants of the territories detached from Turkey to be settled. The date fixed for the termination of the war with Turkey was indeed nearly six years after the armistice was made with the Turkish army. During that period the inhabitants of Palestine, Iraq, and Syria were in the anomalous position of retaining Ottoman nationality, while they looked for protection abroad to the Powers to which the mandates for those territories had been entrusted, Great Britain and France. The coming into force of the Treaty of Peace enabled Laws of Nationality to be issued by the three Governments, and the change of subjection which had occurred *de facto* to be transformed into a change *de jure*.

Articles 30-6 of the Treaty of Lausanne deal with the nationality of persons in the territories detached from Turkey, and effect has been given to the Treaty provisions in the Laws of Nationality. The guiding principle adopted is that Ottoman subjects habitually resident in the detached territory become *ipso facto* nationals of the state to which such territory is transferred.

It is notable that the basis of change of nationality is not domicile but habitual residence. The same criterion was adopted in determining the change of nationality on the annexation of Cyprus by Great Britain in the early stages of the war. The Proclamation which was then issued regarding nationality conferred British nationality on all persons who were resident in the island at a certain date.

Article 31 of the Treaty, following the established practice of treaties of cession, provides that persons over eighteen years of age (that being the accepted age of majority in Eastern

countries), who lose their Turkish nationality and obtain *ipso facto* the new nationality under the preceding article, shall be entitled to opt for the nationality of their previous sovereign within a period of two years from the coming into force of the Treaty. This is followed by a more novel provision empowering adult persons habitually resident in territory detached from Turkey, and differing in race from the majority of the population of such territory, to opt within the same period for the nationality of one of the states in which the majority of the population is of the same race as the person exercising the right to opt. The consent of that state, however, is necessary to the effective exercise of the option.

The effect of this provision is that a person who is, e. g., a Greek or Bulgarian resident in one of the mandated territories, may opt for Greek or Bulgarian nationality, subject to the consent of Greece or Bulgaria. On the other hand, an Arab in Palestine or Syria would presumably not be entitled to opt for Iraq nationality, because he does not differ in race from the majority of the population in Palestine or Syria. This peculiar form of option has its basis in the existence within the former Ottoman Empire of various races, most of which have to-day a national centre in which the majority of the population belong to their race. The exceptions are the Armenian and Jewish races which do not possess state rights in any territory. Jews habitually resident in any of the other territories detached from Turkey cannot opt for Palestinian nationality, but they are enabled to acquire that nationality by complying with the conditions of naturalization.

In the original Treaty of Peace with Turkey, signed at Sèvres in 1920, it was indeed contemplated to create an Armenian state, and Armenians were among the peoples expressly mentioned who were to enjoy the benefit of opting for the state in which their race formed a majority. But the changes and chances of the protracted period of armistice and no-peace with Turkey led to the disappearance of that particular project of the earlier peace conferences before it had become a reality. The Armenians must, therefore, now accept the nationality of the country in which they are habitually resident.

Persons who exercise the right to opt for the nationality of Turkey or one of the detached states in which the majority of the population is racially akin must, within twelve months of

their option, transfer their place of residence to the state for which they have opted. But they are entitled to retain their immovable property in the territory of the state where they had previously their place of residence, and may carry with them their movable property of every description. The more generous practice of certain treaties,¹ by which persons in ceded countries who opt for the nationality of their previous sovereign are not required to emigrate, has not been followed in the Treaty of Lausanne for what are no doubt cogent reasons. It would be embarrassing to the Governments of the detached states if a considerable number of residents in the country were to enjoy Ottoman or other foreign nationality. It is at least a mitigation of the older practice, which required sale of immovable property as well as emigration, that a person who will not adopt the nationality of the new state may retain his property intact.

Article 34 of the Treaty makes provision for adult Turkish subjects, natives of a territory detached from Turkey who are habitually resident abroad, to opt for the nationality of the territory of which they are natives, if they belong by race to the majority of the population of that territory, subject to the consent of the Government of that territory, and subject also to any agreement which may be entered into between that Government and the Government of the country where the persons concerned are resident. Put concretely, the article enables a Turkish subject who is a native of Palestine, Syria, or Iraq, but who is now permanently resident in the United States or some other foreign country, to acquire Palestinian, Syrian, or Iraq nationality if the Government accepts the application, and if there is no agreement with the United States or other foreign country restricting the power of option. The second proviso was inserted presumably to guard against the difficulty that might arise if the country in which such persons are permanently resident regarded them as its own subjects, either because they had been voluntarily naturalized, or because the nationality of the country in which they resided had been imposed on them by the *jus soli*.

The general principle of the article is in accordance with the

¹ See the Anglo-German Treaty of 1890 with regard to the cession of Heligoland to Germany; the Anglo-French Treaty of 1904 with regard to the transfer of territories in Africa; and the American-Spanish Treaty of 1898 with regard to the cession of Porto Rico and the Philippines.

established doctrine of international law, that the nationality of the successor state is not to be forced on persons who are not actually living in the territories at the time the succession takes place, but that opportunity should be given to them to acquire that nationality if they so desire.¹

The final article in the Treaty concerning nationality provides that the status of a married woman will be governed by that of her husband, and the status of children under eighteen years of age by that of their parents.

The principles of the Treaty are implemented in the Nationality Laws which have been issued in the three mandated territories detached from the Ottoman Empire. The form of enactment is indeed different in each country. In Palestine the Nationality Law has been laid down by an Order in Council of His Majesty (dated July 24, 1925) under the Foreign Jurisdiction Act; in Iraq by a constitutional law of the King of Iraq; in Syria and the Grand Lebanon, which are two states comprised in the mandated area of Syria, by Decrees (*Arrêtés*) issued by the High Commissioner.

There could be no doubt that Iraq and Syria should have their special nationality, seeing that they fall within the category of countries which, in the words of Article 22 of the Covenant of the League, "have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone." With Iraq, indeed, progress towards complete independence has been so rapid that His Majesty's Government laid before the Council of the League of Nations, at its meeting in September, 1924, a communication reciting the recognition of an independent Government and the conclusion with the King of Iraq of a Treaty of Alliance; and the Council of the League approved the terms of the communication.

In Palestine, on the other hand, the Mandatory exercises full powers of legislation and administration; it was arguable that, under the words of the Treaty of Lausanne, the inhabitants of Palestine became nationals of the mandatory state. The point was in fact taken in an extradition case which came before the High Court of Palestine and subsequently was the subject of an application for special leave to appeal to the Privy Council.

¹ See Berriedale Keith, *Theory of State Succession*, pp. 46-7.

The persons were wanted by the Italian Government on a charge of fraudulent bankruptcy in Italy, and it was urged that they should not be surrendered because the Anglo-Italian Extradition Treaty (which applies in Palestine) provides that subjects of the Contracting Powers are not to be surrendered, and the accused, who were alleged to be Ottoman subjects resident in Palestine, had become British subjects. The Judicial Committee granted leave to appeal on the ground that important constitutional questions were involved, but the opportunity of a leading decision was lost because the criminal proceedings in Italy were dropped.

The mandate for Palestine, however, made it clear from the outset that there was to be a separate Palestinian nationality, since it prescribed that the Administration should enact a Nationality Law in which there should be included provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine. That English nationality does not apply to the inhabitants of protectorates and mandated territories is stated in Dicey's *Conflict of Laws*, on the ground that these countries are not included in His Majesty's Dominions, and the population do not owe allegiance to His Majesty. Moreover, the Council of the League have laid down as a general principle that the inhabitants of mandated territories are to have a distinct nationality from that of the mandatory Power in all cases, whether the mandate be of the so-called A, B, or C category.

The question arose with regard to the right of the South African Government to confer British nationality on the German settlers in the mandated territory which was formerly German South-west Africa. The Council resolved at their meeting in April, 1923, the following principles :

“(1) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory Power, and cannot be identified therewith by any process having general application.

“(2) The native inhabitants of a mandated territory are not invested with the nationality of the mandatory Power by reason of the protection extended to them.

“(3) It is not inconsistent with these principles that individual inhabitants of the mandated territory may voluntarily obtain naturalization from the mandatory Power in accordance with arrangements which that Power may make under its own law.”

The original Treaty of Peace with Turkey, which was signed

at Sèvres in 1920, comprised a peculiar article (129), dealing with Palestinian nationality: "Jews of other than Turkish nationality who are habitually resident, on the coming into force of the Treaty, within the boundaries of Palestine will *ipso facto* become citizens of Palestine, to the exclusion of any other nationality." The clause was a departure from the general rule of International Law that a succeeding state cannot impose its nationality on aliens resident in the transferred territory. Its motive, no doubt, was to give effect to the idea of Palestine as a "national home" of the Jewish people, which is also expressed in the article of the mandate with regard to the Nationality Law. Objection, however, was raised to the provision both in England and in France on behalf of English and French-Jewish subjects habitually resident in Palestine who desired to retain their existing nationality; and in the end the clause was not included in the definitive treaty.

The Nationality Law in Palestine, as now embodied in the Order in Council, contains no peculiar or distinctive provision. It is partly an application of the articles of the Lausanne Treaty, and partly an adaptation of the English Nationality Law. At the same time it contains certain features of more than local interest. It may be noted that, throughout the law, the words "Palestinian citizenship" and "citizen" are used in place of the words "nationality" and "national." That terminology follows the article of the Palestinian Mandate, and marks the fundamental difference which exists in many Oriental countries between allegiance to the state, which is citizenship, and membership of a nationality within the state, which is a matter of race and religion.

Part I deals with the immediate acquisition of Palestinian citizenship by inhabitants of the country in accordance with the stipulations of the Treaty. In one particular it enlarges the provisions of that instrument for the acquisition of nationality in the detached states. Article 2 of the Order in Council empowers any such persons who are natives of Palestine but are habitually resident abroad to opt for Palestinian citizenship subject to the consent of the Government of Palestine. The article of the Treaty, as is noted above, gives that option to persons who are natives of the country resident abroad only if they belong by race to the majority of the population of the territory. The words used in the Order in Council vest the right of option in all native

inhabitants of Palestine abroad, whether they belong to the Arab majority or to any racial minority of the population. The restriction in the Treaty was not well founded in principle, for there seems no reason why a Palestinian-born Jew resident in America should not have the same right as a Palestinian-born Arab to doff his imported Ottoman nationality and adopt that of his *Patria*. A similar provision is contained in the Iraq Nationality Law which extends the power of option to native inhabitants of Iraq abroad, whether belonging by race to the majority or the minority of the population.

Part II of the Law deals with the acquisition of Palestinian citizenship by birth or otherwise. Any person born in lawful matrimony within Palestine, whose father at the time of such person's birth was a Palestinian citizen, and any person born in lawful matrimony out of Palestine whose father had that character, and was either born in Palestine, or naturalized there, or acquired citizenship under the terms of the Order, is a Palestinian citizen. The application of the *jus sanguinis* is limited to persons born out of Palestine to the second generation only, as was the principle of the British Nationality Act, 1914. Palestinian citizenship will not be handed down to persons born out of the country to the third and fourth generation, as British nationality may now be handed down under the Act of 1922. The application of the *jus soli* is admitted to qualify the main principle with regard to any person born in Palestine who does not by his birth or by subsequent legitimation acquire the nationality of any other state or whose nationality is unknown. The purpose is to avoid the creation in Palestine of a class of stateless persons. This part of the law contains two clauses dealing with the acquisition of Palestinian citizenship by persons resident in Palestine who do not become automatically Palestinian citizens under the provisions of the Treaty. Article 4 gives the power of opting to natives of Palestine possessing Turkish nationality who, though not habitually resident, have been residing in Palestine for not less than six months prior to the date of making an opting declaration. It is somewhat paradoxical that, while native Palestinians who are Ottoman subjects and resident abroad can opt for Palestinian citizenship abroad without further condition, native Palestinians who return to Palestine after the law is in force will have to wait six months before they make their opting declaration. The intention presumably is to

secure a certain seriousness and steadfastness in the applicant and to avoid a grant of citizenship, including the British protection abroad which it will carry with it, to persons who have no genuine attachment to the country.

The next clause provides for the acquisition of Palestinian citizenship, by a simple declaration, by a class of persons who in 1922 made a declaration of their intention to opt for it, and received at that time provisional certificates of citizenship. The circumstances of this provisional grant were anomalous, and the delay that has occurred in the enactment of the Nationality Law has placed the people affected in an undesirable position of semi-statelessness. The Palestine Order in Council, which was promulgated in 1922 and provided a constitutional law for the mandated territory, contemplated the establishment of a Legislative Council to be composed partly of elected members. As at the time no Nationality Law could be issued because the Treaty with Turkey was still in suspense, it was prescribed in a supplementary Election Order in Council that the persons entitled to vote at the elections for the Council should consist of two classes: (1) Ottoman subjects habitually resident in Palestine; and (2) persons of other than Turkish nationality habitually resident in Palestine who, within two months of the date of the Order in Council, made application for Palestinian citizenship.

Some 20,000 foreign subjects, mostly immigrant Jews who had come to settle in the national home, made application accordingly and received provisional certificates. It was held, however, that by so doing they could not be deemed to have renounced their previous nationality, since they had obtained their Palestinian character only for the purpose of the election. Several foreign states, nevertheless, maintained that, by making the opting declaration, the persons had forfeited their previous nationality, and must thenceforth be treated as aliens in their country of origin. Thus was formed a class who in the eyes of the Palestinian and British authorities were e. g. Polish subjects, and in the eyes of the Polish authorities were Palestinian citizens. These persons are enabled to acquire definite Palestinian citizenship, subject to the approval of the High Commissioner, provided they have maintained their residence in Palestine. If since making the declaration in 1922 they have left Palestine, or if their application is not approved, their provisional citizenship

will not be confirmed ; and what their national status may be is a problem left to the lawyers and the consuls.

Part III of the Order in Council deals with naturalization. It gives effect to the provisions of the mandate directing the Government to facilitate the acquisition of Palestinian citizenship, in that it lays down a period of two years' residence only as a qualification for naturalization. Three other conditions are required, good character, an adequate knowledge of one of the three official languages of the country, English, Arabic, or Hebrew, and an intention to reside permanently in Palestine. The period of residence required, which is less than that prescribed in the majority of modern Nationality Laws, is justified by the special circumstances of the country.

Provision is made that a certificate of naturalization may be revoked where either it appears to have been obtained by false representation or concealment of material circumstances, or where the person to whom the certificate is granted has been ordinarily resident outside of Palestine for a period of not less than three years, or has shown himself disaffected or disloyal to the Government. The power of revocation will enable the Government to repudiate those who may have acquired citizenship primarily with a view to obtaining British protection abroad, and leave the country without any intention of returning to it. A naturalized citizen is entitled to the same political rights as a native-born citizen, and the benefit of naturalization may be extended to any child under the age of majority, subject to a right of the child to make a declaration of alienage within a year of attaining his majority. A provision, similar to that in the English Law, is included by which a woman who was a Palestinian citizen previous to marriage to an alien, and whose husband has died or been legally separated from her, may regain her Palestinian citizenship without the requirement of two years' residence. Following the English Nationality Law again, where a certificate of naturalization is revoked, the nationality of the wife and minor children of the person concerned is not to be affected except by a special order, but the wife may make a declaration of alienage within six months of the order of revocation.

Part IV of the Order contains miscellaneous clauses dealing with nationality of women, declarations of alienage, the effect of naturalization abroad on Palestinian citizenship, and similar

matters. The principle of the English Nationality Law with regard to the woman's national status is adopted, and the wife has her husband's nationality, subject only to two provisos. Where the husband ceases during the marriage to be a Palestinian citizen, the wife may make a declaration of her desire to retain that status; and where the wife of an alien who was previous to her marriage a Palestinian citizen lives apart from her husband in such circumstances that the separation may be presumed to be permanent, she may receive a certificate of naturalization as if the marriage had been dissolved. Where any person loses his Palestinian nationality, any minor child follows his status, provided that he obtains the nationality of some other country by the change of nationality of the parent. Any such child, however, within a year of attaining his majority may make a declaration that he wishes to resume the status of Palestinian citizen. A Palestinian citizen, who when abroad is naturalized by any voluntary act, loses his Palestinian citizenship; and any person who becomes a Palestinian citizen at birth, but who is also a national of another state, may when of age make a declaration of alienage.

The definition clause of the Ordinance contains a provision that "Palestine" does not include those parts of the mandated territory to the east of the Jordan and the Dead Sea; that is to say, the Order in Council does not apply to the territory known as Transjordan. Whether there will be a separate Order in Council for Transjordan, or whether the Administration of that country will pass a law in the matter, is not yet ascertained. It was agreed by the Council of the League of Nations, in compliance with the representation of His Majesty's Government in July, 1922, that, in the application of the Palestine Mandate to Transjordan, certain articles and portions of articles were not to be applicable, and that portion of the article dealing with the Nationality Law is excluded which refers to the acquisition of Palestinian citizenship by Jews. In the meantime, in view of the article in the Treaty of Lausanne, the habitual residents of that territory who were Ottoman subjects would appear to possess an undefined nationality of their own. They are not British subjects; they are not Palestinian citizens within the scope of the Order in Council; they are nationals of Transjordan enjoying abroad British protection.

The Nationality Law for Syria and the Lebanon is laid down

in various Decrees of the High Commissioner of the French Republic. The provisions of the Treaty of Lausanne were applied in an *arrêté* issued in September, 1924, for the three federated states of the territory of Syria, and an *arrêté* for the state of the Grand Lebanon. The enactments apply the terms of the Treaty without modification; but, just as within the mandated territory of Palestine there will be two separate nationalities, namely, of Palestine Cis-Jordan and of Trans-jordan, so in the mandated territory of Syria there will be two nationalities, Syrian and Lebanese. Two subsequent *arrêtés*, issued by the High Commissioner in January, 1925, deal with the acquisition of nationality in Syria and the Grand Lebanon apart from the treaty provisions, and contain some interesting variations from the principles adopted in the Palestine Nationality Law.

While the *jus sanguinis* is the guiding principle, the *jus soli* supplements it, and anybody born in the territory who does not prove that he has acquired at birth a foreign nationality is a Lebanese or Syrian. The right of transmitting nationality is restricted to a father who was himself born in the territory of the state. A clause is inserted with regard to an illegitimate child; if his paternity is established while he is a minor, he takes the nationality of the parent whose child he is proved to be. Naturalization is to be acquired after five years' continuous residence; but, in addition, a foreign subject who marries a Lebanese woman and resides continuously for one year after his marriage in the territory can acquire the nationality; while, exceptionally, naturalization may be conferred by special decree on a foreigner who has rendered special service to the state. There is no condition of knowledge of the language.

A foreign woman who marries a subject of the state acquires her husband's nationality; but, on the other hand, a woman of the Lebanon or Syria who marries a foreign subject only loses her nationality if that of her husband is conferred on her by his national law. That is in accordance with the general French Law of Nationality, and the rule gave rise under the Ottoman Régime to vexed questions of interpretation because it was debated whether the Ottoman Nationality Law conferred on a woman marrying an Ottoman subject his Ottoman nationality. The nationality is not automatically lost by naturalization abroad; for, following the Ottoman Law, it is required that, to have this

effect, the acquisition of the foreign nationality must have been made with the consent of the head of the state of the original nationality. That is a limitation on the right of expatriation which is hardly in accord with the more liberal doctrines of modern states. A special power of naturalization is given in favour of the children and of wives who acquire another nationality by the application of Article 36 of the Treaty of Lausanne, that is, by their relationship to a person habitually resident in another state detached from Turkey, if they become resident in the territory of Syria or the Lebanon, and within the year after attaining their majority or the dissolution of their marriage make application.

The Iraq Law, dated the 9th of October, 1924, and issued by the King with the concurrence of the Council of Ministers, like the other enactments, embodies the provisions of the Treaty of Lausanne. It defines habitual residence in Iraq so as to include every person who has his usual place of residence there since the 23rd August, 1921. Iraq nationality is conferred on any person, wherever born, whose father was an Iraq national and was born in Iraq or obtained naturalization there; but this application of the *jus sanguinis* is modified by the application of the *jus soli* to any person born in Iraq whose father was born there and was at the time of that person's birth ordinarily resident there. No provision, however, is made for the nationality of a person born of foreign parents in Iraq whose father was not born there.

The period of residence for naturalization is three years immediately preceding the application, and no condition as to knowledge of the language of the country is prescribed. The Minister of the Interior is vested with absolute discretion to grant or refuse an application for a certificate of naturalization, and may, if he considers that special circumstances render it desirable, dispense with the condition of three years' previous residence. The Iraq Law does not contain clauses similar to those in the Palestinian Nationality Law for the revocation of naturalization on account of disloyal conduct or continuous absence; but Iraq nationality is lost by voluntary naturalization in a foreign state, subject to the proviso that, if at any time a person who has changed his nationality has his usual place of residence in Iraq for more than one year, the Government will have the right to regard him as an Iraq national. The original version of the law required the authorization of the

Government to the naturalization of an Iraqi abroad, and gave a power of expulsion if the naturalized person returned. But these unusual provisions were abolished by an amending law of February, 1925.

Thus, no less than five new nationality systems have been created, each with its distinctive features as to acquisition, retention, and loss. There has been no such multiplicity of national *civitates* in this part of the Orient since the extinction of the Herodian kingdoms.

THE JURIDICAL BASIS OF ARBITRATION

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It is a singular fact that whilst arbitration is being proclaimed throughout the world as a remedy for the solution of international controversies, and the attention of statesmen and politicians is being directed to the organization of machinery to facilitate the application of pacific modes of settlement, yet among jurists there is far from being any universal agreement on what is surely the most fundamental question of all, namely, the *basis* of arbitration. Many writers have asserted that international arbitration is essentially a judicial process. On the other hand, the experience derived from the practical application of the arbitral method in modern times appears to have convinced several of the partisans of peaceful settlement that arbitration is not infrequently synonymous with compromise, and accordingly they have not only advocated the substitution of judicial settlement for arbitration in the case of disputes of a purely legal character, but also the creation of an international court of justice, whose decision might exercise a paramount influence through the evolution of precedent in developing the principles of the law of nations. Dr. James Brown Scott has characterized arbitration as a "thing shadowy and uncertain, fleeting and evanescent," and contrasted this with judicial procedure, which he declares to be "substantial and certain, continuous, and productive of precedent."¹

It seems fairly certain that The Hague Convention regarded arbitration as resting on a juridical foundation. Its object was declared to consist in the settlement of disputes between states by judges of their own choice and on the basis of respect for law. Dr. J. B. Scott draws a distinction between the basis of respect for law and the application of principles of law, and urges that inasmuch as the two are not co-extensive, the possibility of compromise is not thereby excluded, because arbitrators may

¹ *Proceedings of the American Society for the Judicial Settlement of International Disputes*, 1913, p. 239.

respect law without following it.¹ To this it may be replied that the recognition by the Convention of the legal basis of arbitration would seem necessarily to contemplate the application of legal principles in the rendering of arbitral awards, for any other construction would render the declaration meaningless. Moreover, it is to be borne in mind that in the Preamble to the Convention the Powers declared themselves to be "desirous of extending the empire of law and of strengthening the appreciation of international justice." If we accept the theory that arbitration is a judicial process, it will be distinguishable from mediation on the ground that the latter is a diplomatic function. According to the text of The Hague Convention, the part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance. This is merely declaratory of the views universally held by jurists. Vattel gave his conception of the duties of a mediator in these words: "The mediator ought to observe an exact impartiality: he should soften reproaches, calm resentments, and draw minds towards each other . . . but he ought not scrupulously to insist on rigorous justice. He is a moderator and not a judge."²

The distinction thus drawn has been challenged by the view that a conciliatory adjustment of conflicting interests is the true *ratio decidendi* of arbitral awards, compromise being the dominant and prevailing characteristic, and the doubt is expressed that it is improbable that a politico-diplomatic process of this kind can form an effective instrument for developing international law, however useful it might be in the determination of international controversies in particular cases.

It is true that in many cases arbitrators have been expressly authorized to compromise by the terms of the protocol of submission. Renault³ gives as an example the Delagoa Bay dispute between Great Britain and Portugal in 1875. It was agreed that in case the arbitrator could not decide entirely in favour of one or other of the rival claims, he should have the right to give "such a decision as, in his view, would afford an equitable solution of the difficulty." Thus, as Renault points out, the two states gave to the arbitrator a special power which went

¹ *An International Court of Justice*, p. 64.

² Vattel, *Law of Nations* (Dublin, 1787), p. 415.

³ *Revue Générale de droit international public*, 1894, p. 45.

beyond the ordinary limits of the competence of a judge. The dispute arose over the occupation of certain territory on the east coast of Africa. Great Britain contended ¹ that the disputed territory, though discovered by the Portuguese, was never in fact occupied by them, and relied on a treaty of 1823 whereby native chiefs ceded the sovereignty over the territory to the British Crown. The Portuguese claims were based on discovery and exploration by the Portuguese in the sixteenth century, acts and compacts entered into between the Portuguese and the natives, and the recognition of the rights of Portugal by other civilized nations. The award favoured Portugal, and the arbitrator does not appear to have exercised his power to compromise. Another instance is the dispute between France and Holland in 1888 with regard to the frontier districts between Cayenne and Surinam. The Czar of Russia was chosen as arbitrator, but at first he declined on the ground that the terms of reference were too narrow. By a new convention the scope of reference was enlarged and a formal assurance was given by both Governments that the decision would be accepted as final. A unique example is found in the dispute between Costa Rica and the Republic of Central America in 1898. By the treaty of peace of that year certain claims arising out of various incidents during the revolutionary activities in Nicaragua were submitted to the decision of an arbitration tribunal, and it was provided that the judges should give their decision "in the character not only of arbitrators but also of peacemakers, allowing that feeling of charity to enter into their counsels which should reign where vexatious incidents have occurred between brothers." ²

Over-zealous advocates of judicial settlement have referred to cases of this kind in support of their contention that arbitration does not constitute an effective means of securing a decision in accordance with principles of law. To this it may be replied that although arbitration and mediation are separable and distinct processes, there is no objection to the authorization of their concurrent operation, and the fact that the parties to a dispute by mutual accord empower the arbitrator to combine with his proper functions those which belong to a mediator may not rightly be considered as indicative of any inherent quality or defect in arbitration itself. It seems rather to suggest

¹ *Parliamentary Papers (Diplomatic)*, 1875, p. 141.

² *British and Foreign State Papers*, XC, p. 561.

that arbitration has not yet come to be regarded as an universal remedy for the determination of every international dispute, and that in some cases a resort may with advantage be made to a friendly composition. Viewed impartially, the fact that arbitrators have frequently been authorized to compromise is not inconsistent with the view put forward by those who uphold the judicial character of arbitration. On the contrary, the practice may be said to indicate a recognition on the part of the contesting states that a power to compromise is not ordinarily incidental to the functions of an arbitrator, and that in order that such a power may be legitimate it must be expressly granted. On the other hand, it is true that where an authority to compromise is conferred upon the arbitrators in a dispute purely legal in its nature, the development of international law through the decision is rendered impossible.

The pioneers of judicial settlement have gone further than this, however, and assert that apart from any express authority given to the arbitrators, arbitrations have in practice been vitiated by compromise, and the judicial basis of arbitration becomes in consequence a mere delusion. It must be borne in mind that a slight element of compromise is inevitable in every form of judicial procedure and is by no means unfamiliar even in our municipal courts. Sir Thomas Barclay,¹ for example, expresses the view that the reversal on appeal of a large number of judgments in our national courts shows that "justice is often merely a term for decision between two rival claims both equally arguable." But when this is taken into account, an examination of the awards of tribunals of arbitration in modern times does not support the view which the critics of arbitration have suggested. Lapradelle and Politis, who have made an extensive examination of the decisions in the first half of the nineteenth century, show that during that period arbitration was largely of a diplomatic character, and often the awards were based on calculations of national interest rather than on a true balance of arguments.² Yet in the period since that time, especially after the famous arbitration arising out of the *Alabama* claims, the judicial element in arbitration may be said to have taken root, and in the great majority of decisions it is possible to trace

¹ *New Methods of Adjusting International Disputes and the Future*, p. 86. Cf. Pollock, *Law Quarterly Review*, Vol. 35, p. 328.

² *Recueil des arbitrages internationaux*, tome I, p. xliii.

the application of a legal principle. This may be either a rule of international law or a rule prescribed by the parties,¹ and in the latter case, if the rule commends itself, that may lead ultimately to its adoption as a recognized rule of law. Frequently, too, international law has been developed by the application of a doctrine of municipal law, as in the *Pious Fund* case before The Hague Court, where the principle of *res judicata* was held applicable. There has in fact been a steady movement from diplomacy to judicial arbitration. This is no doubt what Rénault had in mind when he wrote :

“J’ose croire et affirmer que l’arbitrage international ne se développera sérieusement qu’en quittant d’une manière absolue le domaine politique et diplomatique où il a été longtemps confiné pour rester pleinement dans le domaine judiciaire où il ne fait qu’entrer.”²

It is impossible within the limits of a short article to enter into a detailed discussion of even a few of the principal decisions of arbitration tribunals, but a short summary may perhaps be given of the better known cases, whilst a few recent decisions which have hitherto given rise to but little comment are deserving of special mention. Among the various points of international law which have been adjudicated upon are questions on the subject of neutrality, the most important case under this head, being that of the *Alabama* claims. There have also been a great many decisions with regard to the definition of boundaries and the interpretation of treaties. A very good illustration of an award setting forth concisely some of the rules of international law applicable to treaties is that rendered in the arbitration between Chile and Peru in 1875. It was held that a treaty became operative at the date of signature, not when the ratifications were formally exchanged, for, according to the law of nations, “the exchange of ratifications has a retro-active effect, confirming the treaty from its date.” Preliminary stipulations were to be regarded as merged in the treaty itself, and governed by its provisions. With regard to construction, it was stated that words were to be construed primarily according to their ordinary meaning, that as an aid to interpretation established usage might have a corroborative bearing,³ and that the subsequent act or communications of the parties might afford corroborative

¹ e.g. The “Three Rules of Washington” in the *Alabama* case.

² Cited by Phillipson, *Studies in International Law*, p. 25.

³ Moore, *International Arbitrations*, Vol. II, p. 2101.

evidence in favour of a particular construction.¹ It was declared to be a well-established principle of international law that after a treaty, possessing all the elements of validity, has been formally executed, it can only be altered or amended before its proper expiration by the same authority, and under the same formality of procedure, as the original.² Other cases deal with the effects of declaring war, the exercise of the right of seizure of vessels, injuries to foreign subjects, and so on. A striking example of the application of a legal rule by an arbitration tribunal is found in the well-known Behring Sea Seal Fisheries Arbitration of 1893. The tribunal confirmed the rule of international law according to which a nation may not, in the absence of any international agreement, extend its jurisdiction beyond the three-mile limit so as prejudicially to affect the citizens or subjects of foreign countries. The regulations which, in accordance with the terms of the *compromis*, the arbitrators were empowered to issue in the event of a decision against the American contention appear to have been designed to satisfy the claims of both parties. Apparently for that reason Wehberg³ has characterized the award as a compromise. It is admittedly true that the declaration entitling the British to capture seals on the high seas was deprived of its practical value by the prohibition of pelagic sealing within sixty miles of certain islands, but nevertheless the decision on the disputed points was in accordance with international law. The tribunal was in fact invested with a dual function. In the first place it was to determine the legality of certain action, and having rendered a decision on this point in conformity with international law, its strictly arbitral function was at an end. The additional task of prescribing regulations was assigned to the tribunal as a matter of convenience, and obviated the necessity of instituting a special commission for the purpose. The decisions of the Permanent Court of International Arbitration at The Hague have been the subject of much adverse criticism, and it must be admitted that in some cases (e. g. the Casablanca Arbitration) the award is not fortified

¹ *Ibid.*, p. 2059.

² *Ibid.*, p. 2101.

³ *Problem of an International Court*, p. 24. Wehberg cites the opinion of Barclay, who has observed that the arbitrators conformed to a precedent of ancient wisdom by rendering a decision which met half the claims of each of the parties. Yet he omits to give the conclusion at which Barclay arrived in the article referred to, namely that "la sentence est certainement bonne au point de vue juridique" (*Rev. de droit international*, 1893, p. 444).

by any controlling principles of law, whilst in others (e. g. the *Pious Fund* case¹) questions of law have been handled in a very doubtful manner. Yet a perusal of The Hague Court reports seems to indicate that as a whole the decisions were given after a careful examination of the rules of international law conceived to be applicable. No one who refers to the voluminous reports of the case, counter-case, and arguments of the respective litigants in the North Atlantic Coast Fisheries Arbitration can fail to be impressed by the exhaustive treatment given to the discussion of questions of international law involved in that case. It is of course notorious that in the award the tribunal exploded the theory of international servitudes, and many publicists have been reluctant to acquiesce in that judgment. The rejection of that doctrine, however, was the result of a careful investigation of the literature, and the procedure was in every sense judicial. Moreover, it has been shown² that in deciding the question in relation to which that doctrine was invoked, the tribunal applied a principle of law by declaring that from the treaty under construction resulted an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty in making regulations under it was limited to such regulations as were made in good faith and were not a violation of the treaty.

Strong evidence in favour of the conclusion suggested in this article is to be found in the recent proceedings of the British and American Pecuniary Claims Arbitration Tribunal, which was created by a special agreement between the two nations on August 18, 1910.³ A suspension of the tribunal's work became necessary during the war, but a large number of cases have been decided since, and although none of the claims submitted arose out of disputes of great international importance, yet the records of the proceedings contain a great many declarations on interesting points of international law. Each member of the tribunal was required, upon assuming the duties of his office, to declare solemnly in writing that he would carefully examine and decide all claims "in accordance with treaty rights and with the *principles of international law and equity*."

¹ The tribunal held that "the rules of prescription, belonging exclusively to the domain of civil law, cannot be applied to the present dispute between the two states in litigation." This is not in harmony with the decisions of several arbitral tribunals. See the instances summarized in Ralston, *International Arbitral Law and Procedure*, p. 261.

² J. E. Hogg, *Law Quarterly Review*, 1910, p. 417.

³ *Treaty Series*, 1912, p. 150.

The *Fiji Land Claims* arose out of the acquisition of certain lands in the Fiji Islands by purchase from native chiefs prior to the cession of those islands to Great Britain in 1874. Great Britain denied the titles of the American claimants. In each case the decision turned on the validity of the claimant's title, and where this was found to be duly proved, the tribunal held that Great Britain, by her refusal to recognize it, had failed to carry out the duty which as the succeeding power in the islands she must be held to have assumed from the point of view of international law. Awards were rendered in October and November, 1923. The award in the *Rio Grande* case contains a declaration as to the power of an arbitral tribunal to settle its jurisdiction. It was held that "there is inherent in this and every legal tribunal a power, and indeed a duty, to entertain and in proper cases to raise for themselves, preliminary points going to their jurisdiction to entertain the claim." This ruling is undoubtedly correct, and recalls the dispute before the commissioners under the Jay Treaty, and likewise the controversy over the indirect claims in the *Alabama* case.¹ In the case of the *Canadienne*, the tribunal applied a principle of private international law. Two vessels had collided in Canadian territorial waters, and the accident was due to fault on both sides. The law to be applied was the *lex loci delicti commissi*. The law in force in Canada at that time was the same as that which obtained in England, and accordingly the loss would be apportioned by requiring each wrongdoer to pay half the loss of the other.² The compensation awarded was calculated on this basis. The same principle was applied in the case of the *Sidra*.

A conspicuous feature in these arbitrations is that the tribunal appears to have rendered decisions on the basis of international law, yet in several cases it recommended on grounds of equity that one of the parties should perform some act as a matter of grace. In such circumstances mediation is combined with arbitration. The recommendation so made, however, did not possess any binding legal effect under the terms of the treaty of submission, though inevitably it must carry with it considerable moral force, and the position therefore is different from those cases in which arbitrators have been expressly authorized to compromise, and where the decision of the tribunal acting as

¹ Cf. Hague Convention, 1907, Art. 73.

² The tribunal cited Marsden, *Collisions at Sea*, 6th ed., p. 123.

mediators has had the effects of a true arbitral award. In the *William Hardman* case, the property of a British subject had been destroyed by armed forces during the war between the United States and Spain in 1898. The tribunal held that the destruction was a necessity of war, and that by the established rules of international law, compensation for war losses could not be claimed as a matter of legal right. Yet the following recommendation was made :

“Notwithstanding the principle generally recognised in international law that necessary acts in war do not imply the belligerent's legal obligation to compensation, there is nevertheless a certain humanitarian conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favour, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in this way, there may be a moral duty which cannot be covered by law, because it is grounded only on an inmost sense of humanitarian assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect. The tribunal cannot refrain from pointing out the various benevolent appreciations given by the Department of State in this connection, and commends them to the favourable consideration of the government of the United States as a basis for any friendly measure which the special condition of the sufferer may justify.”

The *Cadenhead* case illustrates the application of the rule of international law that a foreigner within the jurisdiction of any state is subject to its public law, and has no greater rights than nationals of that country. The circumstances were such, however, as to suggest a lack of prudence on the part of the United States, and accordingly the tribunal expressed the desire that some compensation might be paid as a matter of grace. The case of the *Home Missionary Society* arose out of certain incidents during a native rebellion in 1898 in the British protectorate of Sierra Leone. The award, which was given in December, 1920, confirms the principle of international law that no government can be held responsible for the acts of rebellious bodies of men committed in violation of its authority, when it is itself guilty of no negligence in suppressing the insurrection. Here again, however, an act of grace was recommended to the generosity of the British Government. The award in the *Eastern Telegraph Company* case contains the following observation :

“If the strict application of a treaty or of a specific rule of international law conduct to a decision which, however justified from a legal point of view,

will result in hardship, unjustified having regard to the special circumstances of the case, then it is the duty of this tribunal to do their best to avoid such a result, so far as it may be possible, by recommending for instance some course of action by way of grace on the part of the respondent government."

The important point to notice is that in every case the tribunal was concerned to apply a rule of international law, and moreover was careful to indicate that such mediatory recommendations as were made were not to be regarded as possessing the binding characteristics of an arbitral award. The examples given are typical illustrations of the tribunal's work, and the proceedings have been in every sense judicial.

It is submitted, in conclusion, that plans for the further development of international arbitration should proceed on the assumption that in its modern applications at least it rests on a juridical basis. This is really of fundamental importance, and a failure to recognize it has led to a good deal of confusion, and among other things has caused misunderstandings as to the nature of the distinction between arbitration and judicial settlement. That distinction may in fact be reduced to a purely procedural distinction, and it depends on the fact that in arbitration the arbitrators are appointed *ad hoc* by the parties, whereas in pure judicial settlement there must be a permanent court. In both the process is an essentially legal one. When once this is appreciated, the practical limits of arbitration may be more easily defined. There are large areas of external action in the conduct of states which are not within the field of juristic control, and to such areas arbitration is not applicable. The range of justiciability is primarily determined by the extent of the area within which juristic control can effectively be exercised, and hence in proportion as international law develops, the sphere within which arbitration can operate as a means of eliminating international controversies will be enlarged. We may conclude that arbitration must be confined to disputes of a legal character, that is to such as are susceptible of decision by the application of a rule of international law or of a rule which the parties agree to prescribe. There is, however, a certain psychological factor which must not be ignored, because even a legal dispute is not truly justiciable unless the mental attitude of states is such as to make it so. In other words, although every legal dispute is *potentially* susceptible of solution by arbitration, yet it is not *actually* susceptible unless the parties are willing to treat it in

that way. It is this important consideration which forms the basic explanation of the reservation of such matters as "vital interests" in arbitration treaties. Reservations of that kind indicate that there must be something more than the existence of a legal problem in order that a dispute may accurately be described as justiciable; there must in addition be a willingness on the part of states to apply the arbitral method as the appropriate remedy for the difference. Arbitration, then, as a means of settling international disputes, is subject to practical limitations in at least two directions. It is only suitable in the case of legal disputes, and secondly, inasmuch as matters of policy are not wholly separable from matters of law, its use is qualified in the sense that it can only be applied where the parties are willing to employ it. This difficulty cannot be avoided merely by the conclusion of arbitration treaties in advance—the so-called *compulsory* arbitration—because experience has shown that in such cases the parties qualify their agreement by some such device as reserving matters which affect their honour, vital interests, and so on.

EXTRATERRITORIALITY ¹

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WHEN one realizes the importance of a thorough understanding of the subject, it seems strange that so many writers on international law should have contented themselves with but scattered—and sometimes none too respectful—references to Extraterritoriality in their works and that so many lawyers and politicians should have used the term as loosely as they have done.

This descriptive term is used particularly in relation to the legal status of two entirely different categories of persons and things, namely :

1. Heads of states when in territory other than their own, their families, suites, hotels, and papers. Diplomatic agents, their families, suites, hotels, and papers, when in the state to which the agent is accredited, and when travelling to or from that state. Couriers and their valises. Ships and their personnel when in foreign territorial waters. Troops, their equipment and their prisoners when in non-enemy foreign territory.

2. Persons and their property under a system of consular jurisdiction in foreign territory.

The ascertainment of the exact status of the persons and things in each of these two categories is of real importance, though for a different reason in each case. In the first case it is important because the persons and things concerned are in one way or another representative of the nation and although questions as to their dignities and privileges are generally quietly

¹ In his work *Extraterritoriality* (p. 2) the late Sir Francis Piggott discussed the respective meanings of the words "Exterritoriality" and "Extra-territoriality" and maintained that the first refers to the condition of persons taken out of the ordinary jurisdiction of the Sovereign in whose territory they are living, whilst the second (if it has any meaning at all) refers to the government of those privileged persons by their own authorities from home. The distinction may be sound : some writers seem to think so, whilst others altogether fail to observe it, and the two words appear indiscriminately in treaties, law reports, and various other documents. In this article the words will be treated as synonymous.

avoided or settled by diplomatic means, that cannot always be the case, and on such matters being thrown open to public controversy, national feelings are apt to run dangerously high. In the second case the status of a person and his property existing under a system of consular jurisdiction is of everyday practical importance, since questions of marriage, divorce, inheritance, domicile, &c., may depend upon it for their solution.

First, then, what exactly is extraterritoriality? The question must by no means be cursorily dismissed as one having a perfectly obvious answer—it has not, for the word may be said to have at least four distinct meanings. First, of course, it literally defines the condition of persons and things in relation to their being physically outside certain territory, and this will be referred to here as the *literal* meaning. But during the nineteenth century¹ the word came into use in another sense, one which has now become its most important sense, and, as such, it will be referred to as the *primary* meaning (primary in the sense of first in importance). This meaning is one in which the word defines the condition of persons or things, not outside the actual territory but outside the *jurisdiction* of the Sovereign in whose territory they find themselves and whose jurisdiction should, normally, be co-extensive with his territory. There should be no doubt that such a condition *can* exist. Normally of course jurisdiction is co-extensive with territory—but only normally; the principle which has been drawn from a general state of affairs is not inherently incapable of exception. A Sovereign can cede a portion of his territory, and with it ordinarily goes that portion of his jurisdiction relative thereto; but the greater includes the less and there is no reason, if he and the Sovereign to whom he cedes agree to do it, why he should not reserve to himself jurisdiction over certain persons in that territory, for there is also the not unimportant principle of freedom of contract and there is nothing so inherently pernicious about such an agreement as to render it not permissible as being against the well-being of all nations. Indeed Cockburn spoke of extraterritoriality as being the exclusion of the local jurisdiction,² and Valéry also—"Le véritable sens de cette expression (extraterritorialité) est, en effet, exemption de l'obéissance aux lois du territoire où une personne

¹ Cf. Rivier, *Principes du Droit des Gens*, Vol. I, p. 331.

² Memorandum attached to the report of the Fugitive Slaves Commission, 1876, p. xxxiii.

se trouve.”¹ Used in this sense the word indicates a retention of what, for want of a better term, one may describe as the quality of “outsideness” by a person or thing within the territory—a condition in which such person or thing remains a detached object of his or its national jurisdiction surrounded by foreign territory and jurisdiction, and in this sense what might have been more correctly named extrajurisdictionality has come to be called extraterritoriality owing to the strong insistence of international jurists upon the co-extensiveness of territory and jurisdiction.

Unfortunately the word extraterritoriality has not been confined to the literal or the primary meaning but has been used loosely and applied to persons and things enjoying no more than a number of special privileges and immunities, and thus it has, not so much acquired as been attached to, a third, a *popular*, meaning.

Finally the word has been used in relation to the control exercised by a Sovereign by means of “extraterritorial laws” over the persons and things of his state when those persons and things are physically outside that state, but with the use of the word in this specialized sense the present article is little concerned.

Now there has been a very severe attack (Rivier calls it “*la guerre avec une sorte d’acharnement*”) on the word extraterritoriality by many jurists. They have called it a “picturesque” expression, a fiction, a metaphor—and a dangerous one at that. But one must pause to consider whether this attack is altogether justified. A scrutiny of several of the leading textbooks seems to disclose a certain confusion between what have been called above the primary and the popular meanings, so much so indeed that one is tempted to imagine that certain authors would label the term a metaphor if used in any but its literal meaning of physical absence from territory. Yet to say that extraterritoriality in either its primary (extrajurisdictional) or in its popular sense is a fiction or a metaphor is not correct. In the first case (treating jurisdiction and territory as synonymous in this connexion) it is no more a metaphor than hundreds of other words and phrases in common daily use; it is no more a metaphor than to say “the question arises” or “I always beat him at golf”: a question is not a material which can extend

¹ *Manuel de Droit International Privé*, p. 70.

itself upwards, nor does the winning of a game necessarily involve a battery, but to say that because one continually uses such everyday expressions one habitually speaks in metaphors would be distinctly misleading. The truth is that words such as these have acquired secondary meanings which are so general that they have long since ceased to be regarded as metaphorical, and in some cases, as with the word "upshot" for instance, this "secondary" meaning has become the sole primary meaning. In the second case, that is where extraterritoriality is used in its popularly and wrongfully extended meaning, fiction and metaphor are absolute misnomers, for to be extraterritorial a person or thing must be outside certain territory or jurisdiction, and so long as one foot or one corner remains on the territory or the person or thing is subject to one scrap of the jurisdiction, he or it is not outside the territory or jurisdiction. A person may have so many immunities or privileges that he is almost independent of the jurisdiction, but so long as he is not independent of it in all respects he ought not to be described as extraterritorial, otherwise where is the line logically to be drawn? If a person enjoying almost all immunities be called extraterritorial, why not a person enjoying a good many—or a good few? Why not say that an English Member of Parliament is "in certain respects" extraterritorial in England because he has certain immunities from arrest? One might as well speak of a cup being "to some extent" full. Yet one not infrequently finds these words of limitation applied to extraterritoriality. So high an authority as Grotius used the phrase "quasi extraterritorium," whilst Rivier appears frankly to recognize varying degrees of extraterritoriality.¹

It follows then that extraterritoriality can be accepted as a true and proper expression both for physical absence from a certain territory (its literal meaning) and also for a legal absence from the jurisdiction of the Sovereign of the territory in which the person or thing in question is placed (its primary meaning), and perhaps also, in a minor way, in relation to the force of home laws affecting persons or things abroad; but the term should never be used with regard to persons or things subject to any fraction of the jurisdiction which is normally co-extensive with territory on which they stand.

It remains then to consider whether any of the classes

¹ *Principes*, Vol. I, p. 331.

mentioned in the above two categories can properly be termed extraterritorial: if none of them can, then extraterritoriality in the primary sense is neither a metaphor nor a misnomer but a myth; if but one of them can, then it is a reality.

The First Category: Heads of states when in territory other than their own. The exact legal position of a Sovereign visiting or travelling through a friendly foreign country is nowhere precisely defined, for though the extent of his great privileges may be discussed, it can hardly be the subject of either legislative or judicial decision; nevertheless, in order to discover whether the sum of his extensive privileges amounts to extraterritoriality or not, it is only necessary to see whether there be or be not any check of a *jurisdictional* nature upon his activities. In the Middle Ages we have the cases of the English kings, Richard I and Edward I, who exercised criminal jurisdiction even over the natives of the foreign territories through which they were travelling, and much later (1655) Charles II caused the execution of one of his household in Germany, whilst in 1657 ex-Queen Christina of Sweden claimed the same right in France; but by the middle of the seventeenth century the fundamental ideas of sovereignty and territorial jurisdiction were coming in for scientific examination, and the divine right idea was also the subject of critical scrutiny. Still, the more the situation was clarified by the removal of hazy and imaginary principles, the more clearly did it emerge that the Sovereign abroad must inevitably possess wide privileges and immunities: he was seen as the ruler, representative, agent, servant—what you will—of his country, and as such it was essential that he should be in no way hindered in carrying on his high duties towards his people; moreover, he was the most distinguished possible kind of distinguished guest and to him was therefore due every kind of courtesy: in brief, the visiting Sovereign's modern privileges are not the remnants of the romantic medieval powers of kingship but are founded upon two very practical grounds which may conveniently be referred to as the "immunity of necessity" and "international courtesy." Do these two grounds support a condition of extraterritoriality? However jurists may vary in their opinions as to what a visiting Sovereign may or may not do, there is overwhelming agreement that he may not plot against the safety of the foreign state, and that if he should do so he may, as a last resort, be forcibly conducted to the frontier

and there deported. Obviously the dictates of international courtesy cannot require the toleration of a guest who plots to destroy his host, nor can the immunity of necessity, even though the plotting be to the advantage of the Sovereign's own state, be allowed to cover such an offence. But is the expulsion an exercise of jurisdiction or is it merely, as many writers would have it (without further argument), an act of self-defence? Expulsion is of two kinds: it may be a method of self-protection and no more; or it may be a punishment, involving a previous trial in some form or other, and thus an exercise of jurisdiction—sometimes it is a combination of the two. To take a simple illustration of this: a guest may be driven from a club on the discovery that, unknown to himself, he has the signs of a dangerous disease, say small-pox, on him—that is a case of self-preservation only; or again, he may be expelled because he has been found by the committee to have misconducted himself, that is to say, jurisdiction is exercised, and after a form of trial he has been punished by the denial of his wish to stay and by the disgrace of expulsion. Compare the two cases: the visiting Sovereign commits a wilfully offensive act, he is tried by a special form of trial—a more or less diplomatically secret government inquiry—the verdict is “guilty” and he suffers the one form of sentence which will least interfere with the rule of immunity of necessity—arrest, expulsion and disgrace. He has broken the elemental and universally recognized law of the land, and to argue that the unpleasantnesses which follow are merely regrettable consequences of an act of self-preservation is equivalent to arguing that imprisonment is not a punishment but a regrettable consequence of the community's idea of self-preservation from theft, and all our books on criminal law must be renamed as essays on self-preservation. To say that a visiting Sovereign is granted extremely high but ultimately limited privileges and immunities from the local jurisdiction is in accord with the doctrine of the normal co-extensiveness of jurisdiction and territory, with the two grounds upon which the Sovereign's privileges and immunities are founded, and, not least, with commonsense, whilst the theory of unlimited privileges and immunities—extraterritoriality—requires the setting up of an abnormal condition which, without authority, goes quite unnecessarily beyond the privileges and immunities required, and this has to be broken down by a resort to a plea of self-preservation

—and even then the inquiry into the facts justifying the expulsion has to be explained away as something other than what in fact it is—a trial. The logical conclusion is that such a Sovereign is not extraterritorial, and it follows therefrom that his family, his suite, and his hotel are not extraterritorial since they all depend upon his privileged status for their own, and theirs cannot be greater than that of their chief. It follows also that the head of a state travelling incognito is certainly no nearer a condition of extraterritoriality than when he is travelling in his official capacity.

The papers of the visiting Sovereign might at first sight appear to be in a different position since they may be unconnected with their owner's offence and as such ought to be inviolable. But the object of examining papers is to ascertain the exact extent of injury that their owner is doing to the state, and so far as the papers derive immunity from the offending Sovereign they cannot have a greater immunity than he has. It is true that many of his papers may be expected to concern only the interior affairs of his state and have nothing to do with his offence, but which paper concerns which it is impossible to know without an examination of the whole ; therefore the examination of all papers is obviously proper. It is an unfortunate consequence of examining them all that some inoffensive ones should be seen—in fact they may all turn out to be inoffensive—but the existence of jurisdiction to search cannot depend upon the consequences of search, nor is it reasonable to set up an abnormal condition of extraterritoriality for the papers and leave the offended government to gamble on the chance of being able to justify the search by proving from it that their act was one of self-preservation. Moreover, not *all* of the Sovereign's acts can have been criminal, some must have been harmless ; but his harmless activities unavoidably suffer curtailment, and in the same way his innocent papers suffer unavoidable examination.

Diplomatic Agents, &c. As in the case of the Sovereign, the sanctity of the person which attached to ambassadors has given way to the modern theories of international courtesy and the immunity of necessity—and no doubt the latter has been carried beyond the limits of absolute necessity. The arguments detailed above apply with added force to the ambassador when he is in the country to which he is accredited. In the event of very serious misconduct he is subject to arrest and deportation if

not also to detention for interrogation, and he and his family, suite and papers can have no more immunity from the local jurisdiction than he himself enjoys. But is he in the country to which he is accredited when he is actually in his hotel? The status of his hotel requires brief but separate consideration. Is it a part of his native land or not—that is to say, is it extraterritorial in the *literal* sense? A British ambassador's house has often been said to stand on *British soil*. If that be true, how did it become so—how was the *eminent domain* transferred? The universally recognized method of transferring eminent domain is by treaty, and the existence of any mere custom to the effect that the presence in a building of an ambassador (not himself extraterritorial in the primary sense) changes the eminent domain is a proposition which requires proving up to the hilt, and such proof is lacking. If the building be extraterritorial in the literal sense, then fugitive criminals may take refuge there, and to follow and arrest them or to arrest any other persons on the premises would be an invasion and a hostile act just as much as the invasion of the French and Portuguese colonies in India would be a hostile act. There is no need that the hotel should be extraterritorial and there is no evidence of any intention on the part of any nation to convey the right of eminent domain in any embassy building (indeed, such buildings are often rented in the ordinary way), and the only logical conclusion is that neither does the ambassador draw extraterritoriality from his building nor the building from the ambassador. The position of the diplomatic agent, his family, suite and papers when crossing other territory on the way to or from the foreign station can certainly be no more privileged than when in that foreign station.

Couriers and their valises. Though these two are separable, in that the misconduct of the courier may be so obviously unconnected with his valise as to negative any excuse for examining it, yet each depends solely for immunity upon the visiting Sovereign or the embassies with which they are concerned, and obviously they cannot enjoy greater privileges than these do.

Ships and their personnel—Troops. The more or less isolated condition of the group of persons on board a ship, the territorial flag under which the group lives, the ship's registration in the home port, the governorship of the captain and his officers, all tend to assimilate a ship to a small colony of her country of origin, whether that ship be a public or a private one, and not-

withstanding the attack upon the term extraterritoriality as a disreputable metaphor, more than one jurist of eminence has declared a warship to be a floating portion of her Sovereign's territory. Were that view strictly true, the ship, having entered a foreign harbour, could openly receive fugitive criminals and they could not be recovered by the local Sovereign except by process of extradition, the ship would not be subject to any regulations as to quarantine, anchorages, navigation and so on, nor could it be expelled from the territorial waters (which act implies first a capture) unless the local Sovereign were prepared to prove the urgency of self-preservation—and amongst others the case of the *Caroline* shows how strict a proof is required to support that kind of plea. No doubt the British view of a public ship's privileges is narrower than the views held by many foreign jurists.¹ But, after all, how would the warship anywhere attain to the abnormality of extraterritorial status? The warship, as spoken of above, is a combination of two elements—the ship itself and the personnel—neither of which is extraterritorial, for the deserted ship is mere ordinary state property, not even at the moment in use, whilst every member of a warship's personnel when on shore in a foreign port unquestionably falls under the ordinary local jurisdiction, notwithstanding the fact that he is under a special and well recognized oath to hold himself always subject to the commands of his Sovereign. It is the combination, then, of these two non-extraterritorial elements which forms an entity requiring, like a visiting Sovereign, the full privileges of international courtesy and the immunities necessary for the carrying on of state business, but there is no higher reason which will take the combination beyond this very privileged status into the status of extraterritoriality; there is not even the *droit de légation*, active and passive, the benefit of which an embassy enjoys.

When in foreign non-enemy territorial waters a public ship is engaged in military operations with the consent of the local Sovereign, the position is of course on a par with that of troops similarly engaged on shore, and the specific agreement must be looked to for the ascertainment of the exact status of either; in the absence, however, of a special reservation of something of the local jurisdiction, it would seem clear that these military

¹ Hall, *International Law*, 4th ed., p. 200, mentions the British law making a foreign warship liable to search by the customs authorities.

forces must, having regard to their necessarily complete subordination to their own Sovereign's commands in wartime and to the necessity for unfettered action in the foreign territory, enjoy immunities so complete as to raise their status to one of extraterritoriality. This would apply to all members of the forces, all couriers, equipment and prisoners within the military zone and on the lines of communication with the bases and the head-quarters at home, but not necessarily to leave-men, prisoners or deserters who have passed outside those bounds.

The Second Category: Persons and things existing under a system of consular jurisdiction. A system of consular jurisdiction over a group of persons and their property in a non-Christian country is generally referred to as a system of "capitulations," but the system where it has come into being in recent times is not by any means a reproduction of the old Levantine capitulations—the right to reside and trade, freedom from the ordinary local jurisdiction, immunity of domicile, freedom of religion, &c.—appear. The old capitulation was a gracious grant by a powerful Sovereign to a group of humble petitioners, the word capitulation being derived from the root "caput", indicating a chapter or heading in the deed of grant, but the modern system is built upon treaty—a contract between two Sovereigns for which there is good consideration in the form of reciprocal advantages for their peoples. Examples of such systems may be found in China¹ and in the now past history of Japan,² Siam,³ and Zanzibar.⁴ It is worth briefly examining one of these treaties and noting how completely all jurisdiction over British subjects and their property was transferred to the British consul. In the agreement with Siam, jurisdiction was given to the consul to try all cases, civil and criminal, in which a British subject was defendant, and it was stipulated, among other things, that "British subjects, their persons, houses, premises, lands, ships, or property of any kind, shall not be seized, injured, or in any way interfered with by the Siamese. In case of any violation of this stipulation, the Siamese authorities will take cognizance of the case and

¹ Treaty of Tientsin *plus* stipulations of other China treaties by virtue of the most-favoured-nation clause.

² Treaty of 1858, *plus* stipulations of other treaties, particularly Japan-United States of America and Japan-Austria-Hungary, by virtue of the most-favoured-nation clause.

³ Treaty of 1855 and Supplementary Agreement of 1856.

⁴ Treaty of 1886.

punish the offenders.”¹ Again, the houses, lands, or other property of a British subject dying in Siam passed to the heirs according to English law²; and again, in the absence of a British ship of war, the Siamese engaged to furnish the consul with a force sufficient to enable him to give effect to his authority over British subjects and shipping.³ In due course Siam Orders in Council were issued by virtue of the Foreign Jurisdiction Acts, and British Courts were set up in the country in which criminal cases were named “*Regina v. ———*” and warrants were addressed to the Siamese Commissioner of Police as “an officer of this Court.” Further, so fully was jurisdiction over British subjects transferred, that appeals from the consular courts lay to the Privy Council whilst the prerogative of pardon was vested in the British Crown⁴; moreover, the consul could deport a British subject, whereas the Siamese could not. The British subject could plot against the Siamese Government and all that the Siamese could do was to ask the British consul to arrest and try him. The property of a deceased British subject vested in the consular judge and on intestacy might pass to the British Crown. Instances could be multiplied indefinitely, but it is sufficient to say that the British Minister, as Diplomatic Agent, enjoyed *vis-à-vis* the Siamese a status of less immunity than a British Asiatic coolie. In the Zanzibar treaty the same immunities were specifically acquired, with the noteworthy addition of the words, “Subjects of Her Britannic Majesty, shall, as regards their persons and property, enjoy within the dominions of His Highness the Sultan of Zanzibar, the rights of extraterritoriality.”⁵

Nothing, one would think, could constitute more clearly an absolute transfer or cession of all jurisdiction over British subjects to the end that they might become extraterritorial in the primary sense.

Then came the theory that the consular jurisdiction was not the result of an absolute abandonment by the local to the foreign Sovereign, but an agency or permission to exercise the local jurisdiction in a particular—an English—way. There was *delegation*, not *cession*, and thus the rule that jurisdiction must be co-extensive with territory was saved. Under this theory

¹ Supplementary Agreement, 1856, Art. 2.

² *Ibid.*, Art. 3.

³ Treaty of 1855, Art. VII.

⁴ Cf. Siam Order in Council, 1903, §§ 54 and 57.

⁵ Article XVI of the Treaty of 1886.

the British Sovereign and his officers are regarded as agents of the local Sovereign. The idea has been urged at length by Piggott in his *Exterritoriality* and has been held good by the House of Lords and the Privy Council.

A careful examination of Piggott's learned and exhaustive attack upon the original theory that jurisdiction was really fully ceded, and his explanation of the words in the Foreign Jurisdiction Act, "as if it (power and jurisdiction) had been acquired by cession or conquest,"¹ also his contention that in criminal cases in the consular courts the peace alleged to have been broken was not that of the British Sovereign, will show his arguments to be based on just sixteen words on his fourth page—"The British Sovereign has no inherent rights in an oriental country or over his subjects there." But that statement does not prove that non-inherent rights may not be acquired.

Similarly the English judicial decisions are not universally convincing, eminent as are the authorities responsible for them. The three leading cases are *Casdagli v. Casdagli*,² *Imperial Japanese Government v. P. & O.S.N. Co.*,³ and *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*⁴ Unfortunately it is impossible in the limited space here available to quote at length from these cases and develop the arguments against this theory, step by step, it must suffice to say that the gist of the decisions is contained in the statement in the Zanzibar case that "The Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired and which is within its limits a sovereign power. It results that a judge acting within these limits is a Zanzibar judge. . . ."⁵ Apparently, then, not only was the British Court at Zanzibar one of the Sultan's tribunals, but so also was the Privy Council, and similarly the law administered to British subjects was a special part of the Sultan's law exactly like English law. It is true that by the treaty British subjects were to enjoy "the rights of extrterritoriality," but the Judicial Committee held that, although the whole controversy turned upon the meaning of this one word extrterritoriality, they could not find any definite meaning for the term beyond the fact that the word denoted

¹ 6 & 7 Vict., c. 94, § 1.

² L.R. Appeal Cases, 1919, p. 145.

³ [1895], A.C. 644, L.J.P.C. 1895-6, Vol. 64, p. 107.

⁴ [1901], A.C. 373.

⁵ *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co. and T. D. Charlesworth & Co.*, L.R. 1901, A.C., p. 373.

“a fiction by which the house and land occupied by a foreign Sovereign or his ambassador was treated in law as a part of his dominions, and that it is a convenient word to denote any group of privileges belonging to that class.” Here there seems to be an admixture of the ideas of extraterritoriality in the literal, primary, and popular senses above mentioned. An analysis of these three leading cases certainly seem to show that two of them (*Casdagli v. Casdagli* and *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*) supply decisions founded upon the statement that treaties of this kind result in a *delegation* of jurisdiction, but search as one will, it is extremely difficult to find any explanation solidly satisfying to the ordinary mind why exactly this is so, whilst in the third case (*Imperial Japanese Government v. P. & O.S.N. Co.*) language may be found which even suggests an opposite conclusion.¹

The decisions insistently refer to a derogation² by the original wielder of the transferred jurisdiction, and it would seem that because the transferee derived the jurisdiction from him the transferee must be his agent, yet where treaty transfers of jurisdiction happen to be accompanied by territory, e. g. when nations acquired jurisdiction and territory under the Treaty of Versailles, it is never suggested that the transferee is an agent of the transferrer. To take a simple parallel: a man may sell his freehold land and all his rights in it, and the buyer then holds absolutely in his own right; again, a man grants a right of way over his freehold; is the chauffeur of the grantee, the agent of the grantor, and is the grantor, who has sold a right but not the land itself, bound by the chauffeur's acts? The modern treaty is a bargain in which rights are exchanged for rights, not a unilateral grant during pleasure. But above all there is one particular difficulty in accepting the delegation theory; it puts a Sovereign under a Sovereign. The Sultan of Zanzibar and the King of Siam were the supreme Sovereigns and the British Sovereign was the mere manager, servant, or agent, yet there is

¹ The British Consular Court is again and again clearly contrasted with the Courts of Japan, thus—“Not by the local Courts of Japan but by the British authority exercising in that country extra-territorial jurisdiction. On the other hand, it seems equally clear that any complaint or grievance which a British subject may have against a Japanese subject is to be decided by the Japanese Courts,” and again, “But for the treaty they would be liable to process in the Courts of Japan.”

² Cf. “. . . the jurisdiction which the sovereign power of Japan in derogation of its sovereign rights, has granted to the British Consular Court. . . .” &c.

one great power which is inherent in the real Sovereign—the power of pardon. If the agent can exercise a power, the principal certainly can, yet it is certain that a convicted person in a British consular jail or transferred to a home jail could never be released upon the order of the Sultan of Zanzibar or the King of Siam. They had no jurisdiction whatever, no right to interfere in anything on the land where the British jail stood or with the person of the prisoner, and even had such an order been issued it could not have been enforced. The Zanzibar Sultan, or the King of Siam, then, could not pardon a man sentenced by one of their own judges; it could only be done by the British Sovereign.

Land held by British subjects under such treaty conditions is, of course, not extraterritorial in the literal sense, since eminent domain is not parted with; it could be the subject of a cession to or conquest by another state, and if the new conditions would not admit of similar privileges, there might be a case on the part of the British subject for compensation, but as to its being extraterritorial in the primary sense there could be no doubt whatever, but for the English decisions—decisions which are not held to be conclusive in other countries.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By the RIGHT HON. SIR FREDERICK POLLOCK, Bart., K.C.

MR. FACHIRI'S book on *The Permanent Court of International Justice*¹ was much wanted. A text-book on the Court is a boon, almost a necessity, for lawyers whose business takes them into the field of international affairs; and even since this one was published, the importance of the Court is becoming more manifest. *Ubicunque potest esse litigium ibi debet esse iudicium*. Dante was right there, but his method of a universal monarchy was too summary for this world, and the difficulties of finding another were such that various makeshifts, all of them rather precarious, had to serve from the fourteenth century to the nineteenth. At last we have a real jurisdiction, not yet compulsory, but, according to the best judgment of historians, all jurisdiction was voluntary to begin with.

A new court must form its own practice, and judicial practice demands a guide. Mr. Fachiri's guidance may be trusted. He is clear where there is no doubt, and helpful with suggestion where possible questions are still open. There are some rather curious little points about parties. Members of the League of Nations not being independent states, such as India, certainly can be litigants. Can protected or otherwise dependent states—a state under a mandate of the 'A' type for example, such as Palestine? Mr. Fachiri inclines to the affirmative. In fact Great Britain, as the mandatory Power, has already been a party in a case arising out of a concession in Palestine made by the Turkish Government before the war: see more on this case below.

Mr. Fachiri points out that under Article 36 of the Statute

¹ *The Permanent Court of International Justice*. By Alexander P. Fachiri. Oxford University Press. London: Humphrey Milford (1925), 8vo, VI and 342 pp.

Annual Report of the Permanent Court of International Justice (January 1, 1922–June 15, 1925). Publications of the Permanent Court of International Justice, Series E, No. 1. Leyden: A. W. Sijthoff's Publishing Company, Ltd., 8vo, 440 pp. This is published in English and French editions, and contains full information about the constitution, officers, and members of the Court, a tabular statement of its jurisdiction, both general and special, the text of the Statute and Rules, and a summary of decisions and opinions.

the court will in effect regard as justiciable any dispute which the parties treat as such by submitting it to the court. This is good sense, and brushes away some of the cobwebs that have been spun by ingenious but unpractical publicists. I am inclined to agree with some learned American brethren who think there has been altogether too much fuss about the distinction between justiciable and non-justiciable differences. In the absence of a rigid constitution, questions of this kind which look formidable on paper are apt to settle themselves in practice ; provided, of course, that the parties mean business, which after all is a fundamental condition of getting things done by consent.

Article 38, laying down the classes of authority to be followed by the court, is also very good sense, and, according to the better opinion among international lawyers, good law too. If any one finds "the general principles of law recognized by civilized nations" a vague expression, the answer is that some things not easily defined in terms are nevertheless well enough known. The standard is to be found, as Mr. Fachiri justly says, in the consensus of "the good sense and conscience of the more enlightened portions of mankind." To deny the existence of universal principles of justice is merely to copy the outworn sophistries of the eighteenth-century writers who denied that there were any universal rules of morality. If such people were right, not only Grotius but Ulpian would have laboured in vain. By the way, Mr. Fachiri seems in one place to tolerate the rather common Continental assumption that an arbitrator as distinct from a regular court of justice is not bound to decide according to law. Certainly we have no such doctrine in England, though the parties who create an arbitrator's jurisdiction may by express agreement confer on him any powers, judicial or extra-judicial, they think fit ; they may direct him to decide according to a foreign law, and so forth.

I will now proceed to speak very shortly of some of the court's decisions.

The first and most important judicial decision of the court was in the case of the *s.s. Wimbledon* (1923). Here the facts were simple : the vessel, chartered by a French company, was conveying munitions of war to a Polish base at Danzig during a state of war between Poland and the Soviet Government. The German Director of Canal Traffic stopped her at the entrance to the Kiel Canal under alleged neutrality orders and instruc-

tions from Berlin. The result was a delay of several days, and, negotiation having failed to effect a settlement, a suit was constituted between the European Allies, with Poland intervening, of the one part, and Germany of the other. (A much fuller account both of this matter of parties and the whole case is given by Mr. Fachiri, and the same observation applies to the Palestine case next mentioned.)

Now the Treaty ordains a right of free passage through the Canal, but, by way of reservation, provides as a qualification for exercising the right that the vessel must fly the flag of a nation at peace with Germany. The court held by a majority that so large a further reservation as requiring that nation not to be at war with any Power at peace with Germany could not be implied from any alleged general principles of neutrality. If it had been intended it would have been so expressed. The treaty obligations undertaken by Germany were quite consistent with both sovereignty and neutrality. With all respect for M. Huber and Signor Anzilotti, who dissented, this appears a very sound conclusion. The "national judge" appointed *ad hoc*, Dr. Schücking, of course dissented too; I fear we must say "of course," for I know only one case of any member of an international tribunal voting against the claim of his own nation. That was in the Alaskan frontier arbitration, when Lord Alverstone found himself practically umpire between two members from the United States and two from Canada. He decided against the Canadian claim, and rightly as some learned Canadians afterwards allowed at leisure; but many Canadian lawyers, who ought to have known better, not only gave vent to their disappointment in violent abuse, but actually charged Lord Alverstone with having wilfully sacrificed justice to political expediency. However, unsuccessful parties almost always think the decision was unjust, or else that their case was not properly presented. One must be content if the judgment, willingly or not, is obeyed.

The other formal judgments turn on special questions of fact, or the construction of the governing instruments applicable, or a mixture of both, and do not, therefore, admit of intelligible abridgement beyond the official summary. But incidentally they throw light of no small value on the general principles and procedure of the court. I will call attention to a few points of this kind.

In the case (1924-5) of M. Mavrommatis, a Greek, who before

the war obtained a concession from the Ottoman Government for certain public works in Jerusalem, and during the war another for work at Jaffa, the court laid down that, since every state has "the right to ensure that the rules of international law are respected as regards its subjects," Greece, a Member of the League, was entitled to take up a Greek citizen's case and become itself, in the eyes of the court, the claimant. Thus there was a regular suit between Greece on behalf of the individual plaintiff and Great Britain, the mandatory Power, as defendant. On the merits the claim succeeded as to Jerusalem, the court holding by a majority that it had jurisdiction; but as to Jaffa, it was rejected on the ground of want of jurisdiction, and unanimously. A specialist in compensation cases might be curious to know what fruit M. Mavrommatis (linguistically a kind of gossip of our Blackies and Nigels) has reaped or is likely to reap of the judgment on the successful part of his contention, but this is of no public interest.

Greece appeared again in a dispute with Bulgaria concerning the jurisdiction under the Treaty of Neuilly to award damages for acts committed by Bulgarian troops in Greece. The question¹ turned wholly on the construction of a certain clause in an annex to the Treaty. Now it is indisputable that, partly by reason of due time not being allowed for revision, partly because diplomatists to whom the French language is not known by nature are not infallible in using its terms of art or even current idioms, there is a good deal of loose and unworkmanlike drafting up and down the peace treaties. In this case the court seems to have found the text somewhat oracular, and to have proceeded by the method of "intendment," as our law-books call it, that is, guessing by the light of common sense what on the whole the draftsmen meant or ought to have meant. The only curious point is that several weeks later the Greek Government applied to the Court for further "interpretation" of the judgment, apparently on matters of mixed law and fact which might arise in the course of executing it, but were not included at all in the reference to the court. Bulgaria raised no objection, and the court, choosing to treat the application as made by consent, entertained it (even so, surely *de gratia* rather than *de jure*, for

¹ As defined by a preliminary agreement in the nature of a case stated, quite wrongly (according to English terminology at any rate) described as an arbitration agreement.

such an application was never yet heard of in any court of justice), but only to dismiss it on the ground above indicated. In a new jurisdiction the temptation to try adventurous experiments must be strong; nor in this court can it be restrained by any fear of costs, which of course cannot be awarded against sovereign states. What "every good man would wish," as Serjeant Arabin said, is irrelevant.

The general impression made on an English lawyer's mind is that the method and temper of the court have been judicial and impartial throughout, and it has shown a laudable firmness in resisting attempts to tie its hands by captious exceptions or pettifogging arguments on minor points. This no doubt will be unwelcome to the sort of people who dislike the League of Nations and all its works and would like to see the court prove a failure. It will be welcome to those who seek justice and righteousness among nations rather than the gain of temporary diplomatic advantages in the interest (often misjudged) of their own politicians or traders. *Boni judicis est ampliare jurisdictionem.*

The Advisory Opinions are of less permanent importance, though they illustrate the great variety of matters that may be brought before the court in this way. Some of them do not admit of any further abridgement than has been made by the official summary. One general principle was laid down in the case of the Tunis and Morocco nationality decrees, that the plea of domestic jurisdiction will not preclude the court from passing on the construction of international instruments which on the face of them appear to be "of judicial importance for the purposes of the dispute."

However, the most interesting case of this class is too recent to be included in the *Annual Report*.

In November, 1925, the court gave an Advisory Opinion upon the jurisdiction of the Council under the Treaty of Lausanne in the matter of the frontier between Turkey and Iraq. This is a good example of patience and common sense (for there was really no authority beyond the text itself which the court had to construe) applied in dealing with many arguments of which by no means all appear, to a mind trained in judicial discussion, to be either relevant or seriously maintainable. In various passages the court shows itself quite alive to a principle of civil justice which in this country we regard as fundamental, and

commonly express in the form that you can do anything by consent. There is also an excellent spirit of refusal to be hampered by merely verbal difficulties, or entangled in merely verbal deductions from terms which the parties themselves have not strictly defined. A loosely drawn reference might conceivably raise the question whether the referees were the Council of the League sitting as such, or only the members of the Council as designated persons. In the Middle Ages, we may read, Sovereigns now and then chose to refer their disputes, not to the Holy See, but to the Pope as an individual. That question did not arise here on any possible reasonable construction. If it ever did, I do not think it would give serious trouble. The tangled preliminary discussions before the matter came to the court are not relevant to the present purpose, and if they were, a private professional reason would forbid me to comment on them.

RESERVATIONS TO MULTILATERAL CONVENTIONS

By H. W. MALKIN, C.B., C.M.G.

THE Second Opium Convention, signed at Geneva on February 19, 1925, contained a provision (Article 33) under which the Convention remained open for signature by any Member of the League of Nations until the following September 30. The Austrian Government, which had not been represented at the Conference, signed the Convention on September 30, 1925, but appended to its signature a reservation suspending provisionally the application of certain clauses in the Convention respecting the supply of documents relating to shipments of drugs and the furnishing of statistics. When the fact of the Austrian signature with these reservations was communicated to the other signatories, the British Government addressed a letter to the Secretary General of the League pointing out that reservations to a convention made, as in the present case, without the previous knowledge or assent of the other signatories, involved an important question of principle which was likely to present itself in relation to other conventions negotiated and signed under the auspices of the League, and therefore seemed worthy of consideration by the Council. The British Government requested that the matter might be placed on the agenda for the meeting of the Council in March, 1926, and suggested that the question of the particular reservation made by the Austrian Government should be referred to the Opium Advisory Committee in the hope that that body might be able to find a satisfactory solution of the immediate point raised by the Austrian reservation, and that the Committee of Experts for the Progressive Codification of International Law should be invited to investigate the general question of principle involved and report to the Council thereon with a view to a definite practice being laid down for the guidance of all concerned. At the meeting of the Council in March, 1926, the British suggestions were adopted on the proposal of the Swedish member of the Council.

The question of principle thus raised does not seem to have been the subject of much study by writers on international law

in the past, and it may therefore be permissible, even though the subject is to be studied by the Codification Committee, to make some inquiry into cases which have occurred in the past with a view to discovering whether any established international practice in the matter can be said to exist.

At first sight it might be thought that, as no state is obliged to sign any convention unless it wishes to do so, any state is entitled to accept as much or as little of a convention as it may think fit, and is therefore in a position to make any reservations which it considers desirable, irrespective of the views of the other contracting parties and without obtaining their consent. But such a view is not, it is suggested, consistent with sound principle. Multilateral conventions are after all only a form of contract in which the consideration for the acceptance of the contract by any one party is its acceptance by the others. In all conventions of this nature there are probably provisions which do not appeal much to certain signatories but which they are prepared to accept as a return for securing the acceptance of other provisions, to which they attach importance, by the other parties to the convention. If, however, any party is entitled, without the consent of the other signatories, to pick out of the convention any provisions to which it objects and exclude them by means of a reservation from the obligations which it accepts, it is obvious, not only that the object of the convention might be largely defeated, but that the consideration indicated above is impaired or even destroyed; the other signatories are not in fact getting what they bargained for. It would seem, therefore, that in principle a party to a convention is only entitled to make such reservations as the other parties are content that it should make, in which case the offer of the party concerned to accept the convention without these provisions is accepted by the other parties as a sufficient consideration for their acceptance of the convention as a whole. Or it may well be that most, if not all of the signatories have reservations which they desire to make, in which case the acceptance by each party of the reservations of the others may be regarded as the consideration for their acceptance of its own.

If this view is sound, we should expect to find that, in cases where reservations have been made in the past to multilateral conventions, they were made in such circumstances that their acceptance by the other signatories is either definitely stated or

can be reasonably inferred. Reservations may be made at the time of (1) signature, (2) deposit of ratifications, (3) accession ; they may or may not have formed the subject of previous discussion and agreement, and the circumstances in which they were made, and the document in which they are embodied, may throw considerable light on the question as to their acceptance by the other signatories.

It may therefore be of interest to examine a certain number of comparatively recent cases in which reservations have been made and see to what extent the assent of the other signatories can be shown to have been given. The cases are only selected as samples, and nothing in the nature of an exhaustive examination of the precedents will be attempted. Most of the cases examined relate to conventions of what may be called a technical, as opposed to a political character ; purely political treaties are as a rule of such a nature that reservations to them are not practically possible.

Treaty respecting the Navigation of the Danube, London, 1883.

The British, German, Austrian, French, and Italian ratifications were deposited in London on August 21, 1883, and a separate protocol of each deposit was drawn up and signed by the representatives of Great Britain (as the Head-quarter Government) and of the ratifying Power. The Russian ratification was deposited on August 24, and the protocol contained the following passage : ¹

“ Before proceeding to the exchange of ratifications, the Representative of His Majesty the Emperor of All the Russias made the following declaration :

“ ‘ Considering that the question treated by the Conference at its meeting of the 7th March, concerning the relations between the Principality of Bulgaria and the Suzerain Power, does not come within the programme of the three points which alone were brought before that Assembly, and of which alone it was called upon to take cognizance, the Imperial Government of Russia cannot recognize as obligatory the conclusions which the Conference has thought itself enabled to draw up in this respect beyond the limits of its legal competence ; and the Russian Government continues, in consequence, to regard the question as an open one—reserving explicitly to itself full and entire liberty of opinion upon the principle involved therein.’

“ The Representative of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, President of the Conference, whilst stating that he had nothing to add upon this subject to the observations made by him at the meeting of the 7th March, took note of the reserve expressed by the Representative of Russia, which is inserted in the present Protocol, engaging to bring it to the knowledge of the other Signatory Powers of the Treaty.”

¹ Hertslet's *Commercial Treaties*, Vol. XV, pp. 1091–2.

The Turkish ratification was deposited on October 25, and the following passage occurs in the protocol : ¹

“ Before proceeding to the exchange of the ratifications, the Representative of His Majesty the Emperor of the Ottomans made the following declaration :

“ ‘ Considering that the Conference lately assembled at London was competent to pronounce upon the reserves of the Sublime Porte concerning the nomination of the Bulgarian Delegate to the Mixed Commission, from the fact that that question, inseparable from the Regulations drawn up at Galatz and which instituted the said Commission, came within the programme of the three points of which the Commission was called upon to take cognizance, and of which the second had for its object the confirmation of the aforesaid Regulations ; considering, consequently, that the opinion of the Imperial Government of Russia, expressed in the Declaration inserted in the Protocol of the 24th August last, recording the exchange of the ratifications of the Treaty of the 10th March between Great Britain and Russia, cannot in anywise invalidate the competence of the Conference in this respect, the Sublime Porte declares that it understands that the ratification of the said Treaty by the High Contracting Parties implies that of the right, recognized as appertaining to the Sublime Porte by the Conference at its meeting of the 7th March, of approving the nomination of the Bulgarian Delegate to the Mixed Commission, a right the insertion of which in the Protocol of that meeting has, according to the unanimous declaration of the Conference, the same efficacy as if it formed a part of the Treaty itself ; and that thenceforward the Sublime Porte maintains, as a consequence of the sanction given to that Treaty by His Imperial Majesty the Sultan, that the Bulgarian Delegate, whose nomination will be approved by the Sublime Porte, shall represent the Ottoman Empire upon the Mixed Commission, and shall duly keep the Imperial Government informed of the acts and deliberations of that Commission, his vote being decisive only in so far as it is in conformity with the instructions and meets with the approbation of the Sublime Porte.’ ”

“ The Representative of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, President of the Conference, whilst stating that he had nothing to add upon this subject to the observations made by him at the meeting of the 7th March, took note of the reserve expressed by the Representative of His Majesty the Emperor of the Ottomans, which is inserted in the present Protocol, engaging to bring it to the knowledge of the other Signatory Powers of the Treaty.”

These declarations were not really reservations to any provisions of the Convention, but rather statements as to the political attitude of the Powers which made them. The position is a little obscure, because, owing to the fact that the ratification was deposited separately, there was no opportunity for placing on record the views of the signatory Powers (other than Great Britain) on these two reservations. It was, no doubt, for this

¹ Hertslet's *Commercial Treaties*, Vol. XV, pp. 1092-3.

reason that the statement made by the British representative in each case took the form that it did.

International Sanitary Convention, Venice, 1892.

The deposit of ratifications of this convention was recorded in a protocol signed at Rome on February 13, 1893. This document contained the following passages : ¹

“ Au sujet d’une phrase contenue au § 3 des dispositions concernant le passage du canal de Suez en quarantaine (Annexe I), le Gouvernement des Pays-Bas a désiré voir figurer au présent Procès-verbal la déclaration suivante, à savoir que : ‘ selon la marche de la Conférence de Venise, les mots *chaque Puissance édictera des dispositions pénales contre les bâtiments qui, abandonnant le parcours indiqué par le capitaine, aborderaient indûment un des ports du territoire de cette Puissance* ne sauraient être autrement interprétés que dans le sens que le Gouvernement de chaque Puissance prendra, dans les limites de sa législation, des mesures contre les bâtiments, &c.’ ”

“ Sur quoi, le dépôt des ratifications de Sa Majesté l’Empereur d’Autriche, Roi de Bohême, &c., et Roi Apostolique de Hongrie, de Sa Majesté la Reine-Régente d’Espagne, de Sa Majesté le Roi d’Italie, de Sa Majesté la Reine-Régente des Pays-Bas, et de Sa Majesté le Roi de Suède et Norvège, a été effectué ce même jour, le 30 Juillet, 1892.

“ Ont été successivement présentées au dépôt :

“ Le 13 Février, 1893, la ratification de Sa Majesté l’Empereur des Ottomans. Au moment de la déposer l’Ambassadeur de Sa Majesté Impériale demande l’insertion au présent Procès-verbal de la réserve suivante, que les Puissances Contractantes ont toutes préalablement admise, à savoir que ‘ Sa Majesté Impériale le Sultan ratifie la Convention Sanitaire de Venise à la condition expresse que cet Acte ne porte aucune atteinte, tant aux Règlements et Instructions Sanitaires actuellement en vigueur dans l’Empire, ou à adopter à l’avenir, qu’aux mesures que le Gouvernement Impérial Ottoman pourrait prendre, en temps d’épidémie, à la suite des Résolutions du Conseil Supérieur de Santé.’ ”

“ Une note du Ministre de Portugal auprès de la Cour Royale, en date du 31 Août, 1892, porte la déclaration que ‘ le Gouvernement de Sa Majesté Très-Fidèle, sauf ultérieure ratification, dépendant, selon la Constitution Portugaise, d’un Acte de Pouvoir Législatif, et en tant que son adhésion appartient au Pouvoir Exécutif, accepte définitivement l’Acte de la Conférence Internationale de Venise, aussi bien que les modifications y apportées par les récentes négociations de Paris,’ et qu’il ‘ accepte également la proposition Néerlandaise concernant une phrase de l’Acte de Venise.’ ”

The Procès-verbal was subsequently reopened on November 18, 1893, for the purpose of recording the deposit of the Portuguese ratification. The following passage was inserted in the Procès-verbal : ²

¹ *State Papers*, Vol. 85, p. 19.

² *Ibid.*, p. 21.

“ Ce jourd’hui, 18 Novembre, 1893, le présent Procès-verbal a été rouvert, le Chargé d’Affaires de Portugal s’étant présenté pour procéder au dépôt de la ratification de Sa Majesté Très-Fidèle. A cette occasion le Chargé d’Affaires a déclaré que la ratification de son Souverain est délivrée sous les deux conditions ci-dessous énoncées, analogues à celles qui ont respectivement accompagné les ratifications de Sa Majesté la Reine-Régente des Pays-Bas et de Sa Majesté l’Empereur des Ottomaes, à savoir : (1) qu’aucune des clauses de la Convention dont il s’agit ne modifie la législation sanitaire applicable dans les ports Portugais ; (2) qu’aucune de ces clauses ne rend obligatoire la promulgation d’aucune nouvelle disposition pénale. Le Chargé d’Affaires constate que ces deux conditions ne préjugent en rien les autres déclarations formulées en son temps par le Comte de Macedo, et acceptées par la Conférence de Venise, comme interprétation de la Convention, relativement aux avis télégraphiques prescrits à l’Annexe I, et aux charges découlant de l’emprunt prévu à l’Annexe II.”

It will be seen that the Turkish reservation had been previously accepted by the contracting parties, and this fact is recorded in the Procès-verbal. Inasmuch as the Dutch declaration was inserted in the Procès-verbal, its acceptance by the other parties may be inferred ; in any case, it is rather an interpretation of a particular provision of the convention than a reservation. The position of the Portuguese declaration is less clear, but it seems to have been regarded as equivalent to the reservations already made by Holland and Turkey and to be covered by the assent which had already been given to those reservations.

International Sanitary Convention, Dresden, 1893.

This convention was signed at Dresden on April 15, 1893. The Powers whose representatives had not been able to sign on that date were allowed to accede by means of a *Protocole d’Adhésion*. Great Britain accordingly acceded by a protocol signed at London on July 13, and Berlin on July 15, 1893. The protocol was signed by the German Secretary of State for Foreign Affairs as representing the Head-quarter Government, and contained the following passage : ¹

“ Le Royaume-Uni de la Grande-Bretagne et d’Irlande adhère à la Convention Sanitaire Internationale, conclue à Dresde le 15 Avril, 1893, et à ses Annexes, sous la réserve toutefois que, dans le Royaume-Uni, les personnes bien portantes qui arrivent à bord d’un navire infecté ne soient pas soumises à une observation, mais seulement à une surveillance médicale dans leur domicile.

“ Le Secrétaire d’Etat au Département Impériale Allemand des Affaires Etrangères, M. le Baron Marschall de Bieberstein, accepte au nom des Puissances

¹ *State Papers*, Vol. 85, p. 18.

Signataires de la Convention cette Déclaration d'Adhésion, et constate en même temps que les Gouvernements Signataires ont consenti à la réserve faite ci-dessus."

In this case, therefore, the assent of the other signatories to the British reservation was expressly given and formally recorded.

International Sanitary Convention, Paris, 1894.

This was signed on April 3, 1894, and certain reservations were inserted in the Procès-verbal of signature. It was not ratified, however, until 1897, when there was signed simultaneously with the Procès-verbal of the deposit of ratifications a declaration which replaced the reservations referred to, and also contained the following passage :¹

"Les Gouvernements Signataires consentent à ce que les ratifications du Gouvernement de Sa Majesté Britannique ne contiennent pas l'Annexe 3 de la Convention. Les dispositions de cette Annexe ne seront pas appliquées, en conséquence, aux navires de guerre ou de commerce de la Grande-Bretagne et d'Irlande et de l'Inde Anglaise."

The consent of the other signatory Governments to the exclusion from the British ratification of Annex III of the convention is thus formally recorded.

International Sugar Convention, Brussels, 1902.

At the time of the signature of this convention on March 5, a "Protocole de Clôture" was signed which contained a statement on behalf of Great Britain to the effect that no bounty, direct or indirect, should be accorded to sugars of the Crown Colonies during the operation of the convention, and that, as an exceptional measure and while reserving entire liberty of action in regard to the fiscal relations between the United Kingdom and British colonies and possessions, during the operation of the convention no preference should be given in the United Kingdom to colonial sugars over sugar produced in the contracting states. Subsequently, questions arose as to the effect of this declaration, and after certain communications on the subject had been made to the German and Austro-Hungarian Governments, the views of His Majesty's Government were communicated to the countries which were parties to the convention in a circular dated January 13, 1903. These views were repeated in the following declaration, which was made by the British

¹ *Treaty Series*, No. 8, 1899, p. 18.

representative when depositing the British ratification on January 31, 1903 : ¹

“ Au moment de déposer les ratifications de Sa Majesté Britannique son Excellence le Ministre de la Grande-Bretagne déclare qu’il est indispensable de constater que le Gouvernement de Sa Majesté Britannique ne consentira dans aucun cas à être obligé de pénaliser les sucres primés qui pourraient être importés dans le Royaume-Uni et qui proviendraient de l’une ou de l’autre des Colonies Britanniques autonomes.

“ Il déclare, en outre, qu’il ne pourrait consentir à ce qu’aucune question se rattachant à cet objet soit soumise à la Commission Permanente à établir en vertu de l’Article VII, et que la ratification de la Convention par Sa Majesté est déposée moyennant la Déclaration explicite mentionnée ci-dessus.”

In this case no express assent to the British reservation, if it is to be regarded as such, was recorded, but, as it had been previously brought to the notice of the other signatories, their assent may be assumed.

International Sanitary Convention, Paris, 1903.

In the Procès-verbal of signature of December 3, 1903, it is recorded that the British delegate made a declaration renewing certain reservations and declarations made during the conference as regards the International Office of Health, the sanitary station at Ormuz, and the position of the British colonies, &c. The Procès-verbal states that the conference “gave act to this declaration.” In January, 1905, the British Ambassador at Paris was instructed to deposit the British ratification with the French Government, handing to them at the same time a declaration recapitulating the above reservations. The French Minister for Foreign Affairs stated that he was unable to receive the ratification if it were accompanied by reservations of any kind ; he could only communicate the reservations to all the signatory Powers and, if they were accepted unanimously by the latter, make special mention of them in the Procès-verbal of the deposit of all the ratifications, which must eventually be drawn up. Accordingly, when this Procès-verbal was signed on April 6, 1907, the signatories took act of the fact that the British ratification was deposited with two declarations relating to the sanitary station at Ormuz and the position of the British colonies, &c. The other reservations mentioned in the original British declaration were apparently withdrawn. The Procès-verbal also took act of an unimportant declaration deposited with the United

¹ *State Papers*, Vol. 95, p. 16.

States ratification, and of a Persian declaration as to the flag to be flown over the sanitary station at Ormuz.¹

The Procès-verbal, therefore, established the consent of the other signatories to the reservations in question. It is interesting, however, to note that the French Government (as the Head-quarter Government) insisted on these reservations being communicated to the signatory Powers and agreed to by them before a ratification containing the reservations in question could be accepted.

Algeciras Act, 1906.

This was signed on April 7, and the American representatives signed subject to the following declaration, which they made in plenary session on the same day :

“ Le Gouvernement des Etats-Unis d’Amérique, n’ayant pas d’intérêts politiques au Maroc, et n’ayant été, en prenant part à cette Conférence, animé de désirs et intentions autres que de contribuer à assurer à toutes les nations l’égalité la plus étendue au Maroc en matière de commerce, de traitement et de prérogatives, et d’y faciliter l’introduction de réformes dont le résultat serait un bien-être général basé sur une cordialité complète de relations extérieures et une stabilité administrative intérieurs, déclare : qu’en s’associant aux Règlements et Déclarations de la Conférence par la signature de l’Acte Général, sous réserve de ratification en conformité avec les lois constitutionnelles, et du Protocole Additionnel, et en acceptant leur application aux citoyens et aux intérêts américains au Maroc, il ne prend sur lui aucune obligation ou responsabilité par rapport aux mesures qui pourraient être nécessaires pour la mise à exécution des dits règlements et Déclarations.”

When the American ratification was deposited, the American representative stated that it was subject to the above declaration, and his statement was embodied in the Procès-verbal.²

This declaration was presumably intended only to show that in signing the convention the United States did not intend to depart from their traditional policy of non-interference in European affairs. It was not really a reservation to any of the provisions of the convention, and, in so far as it may have required the acceptance of the other signatories, such acceptance can be assumed from the fact of the declaration having been made in public sitting and recorded in the proceedings of the conference, and from its subsequent insertion in the Procès-verbal of the deposit of ratifications.

¹ *Ibid.*, Vol. 107, p. 346.

² *Ibid.*, Vol. 99, pp. 167-70.

Geneva Convention, 1906.

The British representative signed this convention, subject to a reservation of Articles 23, 27, and 28.¹ These articles dealt with the use of the red cross as a trade mark, &c., and its abuse in time of war by soldiers or individuals. The reason for this reservation was that the provisions in question could not be enforced without legislation in this country. There is nothing which placed on record any assent to this reservation by the other signatory Powers, but they must have been fully aware that it was going to be made, for in the Fourth Committee of the conference, which dealt with these articles, the British delegate strongly urged the undesirability of inserting in the convention an article binding all its signatories to enact similar laws, and added that His Majesty's Government were ready to affirm the desirability of such legislation, and, when the formal question, "Is it obligatory on the Powers to engage in the convention to take measures of repression against the abuse?" was put, the British delegate voted against it. In these circumstances it may fairly be assumed that the other signatories were willing to accept the British signature, subject to this reservation.

Night Work of Women Convention, Berne, 1906.

The Danish representative signed subject to a declaration made on the same day in plenary session to the effect that Denmark would not be bound by the period fixed for ratification in Article 8 of the convention.² This is an unimportant reservation, and, as it was announced in plenary session, the other signatories certainly had notice of it and may be assumed to have accepted it.

Agreement respecting the Unification of Pharmacopoeial Formulas for Potent Drugs, Brussels, 1906.

Simultaneously with this agreement there was signed a Procès-verbal of signature containing reservations by the German, Austrian, United States, British, Portuguese, and Swedish Governments.³ The Procès-verbal contained the following passage:

"Au moment de procéder à la signature du présent Procès-verbal, les Soussignés se déclarent d'accord pour reconnaître que le droit visé dans la

¹ *State Papers*, Vol. 99, p. 977.

² *Ibid.*, Vol. 100, p. 798.

³ *Ibid.*, Vol. 99, pp. 185-7.

première des réserves formulées par le Gouvernement de Sa Majesté Britannique est acquis à tous les Gouvernements signataires.

“Il est entendu que les Parties contractantes qui useront de ce droit se donneront réciproquement connaissance, par l'intermédiaire du Gouvernement belge, des modifications apportées aux dispositions de l'Arrangement.”

The Procès-verbal was signed by representatives of all the signatories, and their assent to these reservations may therefore be assumed.

International Copyright Convention, 1908.

This convention replaced, as between the contracting states, the Berne convention of 1886 and certain subsidiary instruments, but Article 27 of the convention provided that the signatories might, at the time of exchange of ratifications, announce their intention of continuing to be bound on certain points by the provisions of these previous instruments instead of by those of the new convention. This right was exercised by Japan, and the reservations which she accordingly made were included in the Procès-verbal of the deposit of ratifications signed on June 9, 1910. This Procès-verbal contained a provision under which signatory states which were not yet in a position to ratify could forward their ratifications subsequently, stating at the same time any reservations which they might make in accordance with Article 27. Accordingly, the Governments of France and Tunis, Norway, and Great Britain made reservations, which were stated in the notes conveying their ratification and were communicated to the other signatory Powers.¹

These reservations were all made in pursuance of an express provision in the convention, and there can therefore be no question but that the assent of the other signatories was implied.

Convention for the Suppression of the White Slave Traffic, Paris, 1910.

When signing this convention of May 4, 1910, the German delegates reserved Article 6 (dealing with the execution of *com-missions rogatoires* relating to offences against the convention), and the Brazilian representative reserved Article 5, which provided for the automatic inclusion of white slave traffic offences in the list of extraditable crimes.²

At a meeting of the conference on April 26, the German

¹ *Ibid.*, Vol. 102, pp. 631-5.

² *Ibid.*, Vol. 103, p. 248.

delegates had pressed for the insertion in Article 6 of a paragraph allowing parties to the convention to execute *commissions rogatoires* directly (as under The Hague Civil Procedure Convention of 1905) by their diplomatic and consular officers, with the consent of the states concerned or if not opposed by them. This proposal was lost on a vote by seven votes to six. The German delegates then asked that their claim to carry out the above proposals should be entered in the protocol as a formal reservation. This was objected to on the ground that it was in direct contravention of the vote just given by the conference. At a subsequent meeting on May 2, the German delegates announced that, after reference to their Government, they would be able to sign the convention subject to the complete reservation of Article 6. At the same meeting the Brazilian delegate stated that he was under the necessity of making a reservation in regard to Article 5, since his Government, while ready to add infractions of the provisions of the convention to the list of extraditable crimes in the special treaties that would be submitted by the Powers represented at the conference, would not, for constitutional reasons, be able to bind itself in a collective convention in regard to those particular infractions.

It appears, therefore, that notice of these intended reservations was given two days before the signature, and it may be assumed that the other signatories were content that Germany and Brazil should sign, subject to these reservations.

Conventions relating to Collisions and Assistance and Salvage at Sea, Brussels, 1910.

Simultaneously with these conventions, there was signed a *Protocole de Signature*, according to which the provisions of the two conventions were to be applicable to the colonies and possessions of the contracting Powers, subject to certain reserves by Germany, Denmark, United States, Great Britain, Italy, Holland, and Portugal.¹ The protocol was signed by all the contracting states and the reservations were obviously agreed by all the parties.

Sanitary Convention, Paris, 1912.

This was accompanied by a *Procès-verbal de Signature*² containing reservations or declarations by the United States, Great

¹ *State Papers*, Vol. 103, p. 449.

² *Ibid.*, Vol. 108, p. 275.

Britain, Turkey, Sweden, Haiti, Panamá, Portugal, Holland, Brazil, Greece, Honduras, Persia, Siam, Egypt, and Denmark. Ratifications were not deposited until October 7, 1920, when there were inserted in the protocol further declarations by Great Britain, the United States, Spain, and Panamá.¹ The United States reservation had been communicated to the other signatory states in November, 1913, and was apparently accepted by them. The Spanish and Panamanian reservations related to the same article. In any case, assent was given by the signature of the *procès-verbal* and protocol respectively.

Opium Convention, The Hague, 1912.

This convention was originally signed on January 23, 1912. France signed subject to the right to ratify and denounce separately as regards the French protectorates. Great Britain signed subject to a declaration to the effect that the convention would apply to certain British eastern possessions but that the British Government reserved the right to sign and denounce the convention separately in the name of any Dominion, colony, dependency, or protectorate other than those specified. These two "reservations" were really not reservations in the ordinary sense but were rather excluding declarations as regards colonies. In ordinary cases no question of the consent of the other signatories arises as regards such declarations.

Persia and Siam signed subject to reservations as to five articles which only affected "Treaty Powers" in China; Persia and Siam not being such Powers, the reservations were really unnecessary, but in any case there could be no question of consent being required for them.²

The convention was left open for subsequent signature by Powers not represented at the conference. Belgium signed on June 18, 1912, with a reservation as to separate accession or denunciation as regards the Belgian Congo. This was in the same position as the British and French reservations above referred to. Colombia signed on January 15, 1913, subject to approval by the legislature of Colombia; this was an unnecessary precaution, as the convention contained a ratification clause. Sweden and Montenegro signed in 1913, subject to almost identical declarations with regard to the article restricting the exportation of prepared opium. The ground for this declaration

¹ *Ibid.*, Vol. 113, p. 786.

² *Ibid.*, Vol. 105, pp. 499-505.

was that opium was not manufactured in Sweden or Montenegro, and the reservation might be regarded as unnecessary. Switzerland signed on December 29, 1913, subject to ratification and with a declaration that it would not be possible to promulgate the necessary legal measures within the period laid down in the convention.

It will be seen, therefore, that none of these reservations were of much importance; as the convention never came into force, owing to the absence of certain important ratifications, until provision was made for this by Article 295 of the Treaty of Versailles and the corresponding provisions of the other Peace Treaties, there was no opportunity for dealing with these reservations by means of a Procès-verbal of the deposit of ratifications.

Radiotelegraphic Convention, London, 1912.

This convention was accompanied by a *Protocole Final*, of which the following portions are material : ¹

“ Au moment de procéder à la signature de la Convention arrêtée par la Conférence radiotélégraphique internationale de Londres, les Plénipotentiaires soussignés sont convenus de ce qui suit :

“ II. Il est pris acte de la déclaration suivante :

“ La délégation des Etats-Unis déclare que son Gouvernement se trouve dans la nécessité de s'abstenir de toute action concernant les tarifs, parce que la transmission des radiotélégrammes ainsi que celle des télégrammes dans les Etats-Unis est exploitée, soit entièrement, soit en partie, par des compagnies commerciales ou particulières.

“ III. Il est également pris acte de la déclaration suivante :

“ Le Gouvernement du Canada se réserve la faculté de fixer séparément, pour chacune de ses stations côtières, une taxe maritime totale pour les radiotélégrammes originaires de l'Amérique du Nord et destinés à un navire quelconque, la taxe côtière s'élevant aux trois cinquièmes et la taxe de bord aux deux cinquièmes de cette taxe totale.

“ En foi de quoi les Plénipotentiaires respectifs ont dressé le présent Protocole final, qui aura la même force et la même valeur que si des dispositions étaient insérées dans le texte même de la Convention à laquelle il se rapporte, et ils l'ont signé en un exemplaire, qui restera déposé aux archives du Gouvernement britannique et dont une copie sera remise à chaque partie.”

These two reservations were, therefore, agreed by the other signatories, whose agreement was officially recorded in the protocol.

¹ *State Papers*, Vol. 105, p. 227.

Agreement relating to Rights of Industrial Property affected by the World War, Berne, 1920.

A Swedish reservation was included in the Procès-verbal of signature and may therefore be taken to have been agreed by the other signatories. The convention was open to accession by other Powers and it was provided that such accession, "emportera, de plein droit et sans délai, adhésion à toutes les clauses et admission à tous les avantages stipulés dans le présent arrangement." Great Britain subsequently acceded subject to a reservation as to one of the periods provided for in the convention; this reservation had been previously communicated to the Swiss Government as the Head-quarter Government, who accepted it and promised to bring it to the notice of the states who were members of the Union for the Protection of Industrial Property. Norway subsequently acceded subject to the exclusion of trade marks and industrial designs, but there is nothing to show whether, as in the case of the British reservation, this had formed the subject of previous agreement.¹

The First Peace Conference at The Hague, in 1899, was not very fruitful of reservations. Reservations were made at the time of signature to the Convention for the Pacific Settlement of International Disputes by the United States, Roumania, Serbia, and Turkey.² Each of these reservations had been previously made in the form of declarations at sittings either of the full conference or in commission, and, as will be seen later, there seems to have been an understanding that reservations which had been thus made and were therefore brought to the knowledge of the other Powers could be maintained at the time of signature. The American reservation had been made in plenary session on July 25; the Roumanian at a meeting of the third commission on July 20; the Serbian at the same meeting; and the Turkish at a meeting of the same commission on July 22. Each of these declarations was recorded in the minutes of the meeting at which it was made.

An interesting question arose, however, in connexion with the British signature to the convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare. The conventions adopted at The Hague remained open for

¹ *Ibid.*, Vol. 113, pp. 1047 and 1050.

² These reservations are given in Dr. Pearce Higgins's *The Hague Peace Conferences*, pp. 528-9.

signature until December 31, 1899, and some time before that date the Dutch Government, as the Head-quarter Government, were informed that the British plenipotentiaries were authorized to sign the convention in question subject to a reservation that Her Majesty was unable to accept Article 10, dealing with the treatment to be accorded to the shipwrecked, wounded, or sick who are landed at a neutral port with the consent of the local authorities. The Dutch Government refused to accept a signature subject to this reservation, on the ground that, since the conventions were to be dated July 29, 1899, although they might be signed up to December 31, it resulted that the only reservations which could be admitted were those which had been expressly made before July 29 and had been recorded in the minutes of the conference, and had therefore been brought officially to the notice of the other delegations. If this were not so, any state might sign one of the conventions with a reservation as regards its most important provisions and thus be relieved of a heavy obligation, while the other Powers, who had already signed without any such reservation, would nevertheless be bound by those obligations *vis-à-vis* of the state in question. The Dutch Government, therefore, could not accept the reservation without referring it to the other signatories, but they were willing to do so and recommend its acceptance. This was done, and all the other signatories agreed; the convention was accordingly signed subject to this reservation on December 29, 1899.

Subsequently, it appears that Germany, Italy, and the United States also desired to reserve their liberty in regard to Article 10, and finally the Dutch Government suggested that, with a view to uniformity, the article in question should be excluded from the ratification by all the signatories. This was done.

It will be seen that the attitude adopted by the Dutch Government was in accordance with what is suggested above to be the true principle as regards reservations, i. e. that they can only be made with the consent of the other signatories. The conference did not adopt any formal rules of procedure, and it has not been possible to trace any record of a definite agreement that reservations which had been previously stated might be made at the time of signature, but the Dutch Government obviously took the view that the fact of the reservations having

been previously stated and recorded in the proceedings of the conference, implied their acceptance by the other signatories.

The Second Peace Conference of 1907 produced a plentiful crop of reservations, of which a list will be found on pages 532-7 of Dr. Pearce Higgins's *The Hague Peace Conferences*. The conference adopted a set of rules of procedure, but these were silent on the subject of reservations. It is, however, clear that the principle which, as indicated above, had been tacitly adopted in 1899, became definitely part of the procedure of the conference, and that any state was allowed to make at the time of signature any reservations which had previously been made at a sitting of the conference. The regular procedure was that, when a convention was voted, each state gave its vote subject to any reservations which it desired to make; these reservations were recorded in the minutes of the meeting, and were repeated by the delegates concerned when signing the convention. As a result of a study of the minutes of the conference, it has been possible to establish definitely that, with two exceptions, each of the reservations which were made at the time of signature had been previously made in the manner described above.¹ Of the two exceptions, it has not been possible to ascertain the history of the Chinese reservation to Article 21 of the Tenth Convention. The other exception is that of the British reservation to Articles 16, 17, and 18 of the Fifth Convention (Neutral Powers and Persons in Land Warfare), and it is of some interest. This reservation had not been expressly made at any sitting of the conference, but when the Dutch Government were informed of the intention of the British delegates (who availed themselves of the power given to sign at any time before June 30, 1908) to sign this convention subject to a reservation of these three articles, no objection was raised by them to this course. At first sight it might appear that the attitude of the Dutch Government was inconsistent with the position which they had adopted in 1899 (see page 156 above), but in point of fact there was a special reason which was probably the explanation of their action. The three articles in question were all that remained of a German draft of twelve articles under which special privileges were

¹ In a few cases a delegation had reserved a whole convention, and subsequently signed subject to a reservation of one or two specified articles. In such cases the action taken at the time of signature consisted not in the making of a fresh reservation, but in the withdrawing of the bulk of those which had been previously made.

accorded to neutral aliens resident in belligerent territory. The whole of this scheme was strongly opposed by the British delegation, and the three articles in question, which alone emerged from the Second Committee, were given what Monsieur Renault, the Rapporteur of the Drafting Committee, described as an "asile respectable" in Chapter 3 of the convention. The hostility of the British delegation even to this remnant was perfectly well known at The Hague, and the Dutch Government would appear to have thought that, this being so, the fact that no formal reservation had been made was immaterial.

As a final example, it may be of interest to refer to the attempt of the Chinese delegation to make a reservation to the Treaty of Versailles. At a plenary session of the Peace Conference on May 6, 1919, the Chinese delegation gave notice of a reservation to the provisions which now form Articles 156-8 of the treaty, dealing with Shantung. On May 26, they officially notified M. Clemenceau, the President of the Conference, that they were prepared to sign the treaty with this reservation. On June 24, they were informed by the Secretary-General of the conference that reservations to the text of the treaty were not permissible. Subsequently, the Chinese delegation proposed that they should be allowed to enter their reservation as an annex to the treaty, to send to the President before proceeding to Versailles a separate declaration explaining that their signature would be affixed subject to this reservation, or to re-word the reservation in such a way as simply to put on record that the fact of their having signed was not to be understood to preclude China from asking at a favourable time for the reconsideration of the Shantung question. All these proposals were rejected, and consequently the Chinese delegation refrained from signing the treaty.

This case, as a precedent, is quite inconsistent with any theory that a state is entitled without the consent of the other signatories to make any reservations it pleases, though of course a treaty of peace is of a somewhat special character in this respect. The Treaty of Versailles, however, contained such a mass of technical provisions that it would not have been surprising if some of them had formed the subject of reservations by one or more of the Allied and Associated Powers. In point of fact, however, in the few cases where an Allied Power desired that any provisions of this nature should not be applicable to it, an express provision to this effect was inserted in the text of the

article—see, for instance, Articles 287 and 299 (c), and compare also Article 98 of the Treaty of Lausanne.

It will be seen that of all the cases examined above where an actual reservation was made to any provision of a convention, there is hardly one as to which it cannot be shown that the consent of the other contracting Powers was given either expressly or by implication. Where the reservation is embodied in a document (which must have formed the subject of previous discussion and agreement) signed by the representatives of the other contracting Powers, consent is express; where the reservation had been previously announced at a sitting of the conference and was repeated at the time of signature without any objection being taken, consent is implied. And certainly there is no case among those examined which could be quoted as a precedent in favour of the theory that a state is entitled to make any reservations it likes to a convention without the assent of the other contracting parties. It is unlikely that a wider examination of the precedents would lead to a very different result, and, if so, it may fairly be said that the practice of nations is strongly in favour of the view which it was suggested at the beginning of this article is the only one consistent with sound principle.

As regards the procedure to be adopted in the matter, it will be seen that, with respect to reservations made on the day when a convention is signed, it is not unusual for them to be embodied in either the Final Act or in a *Protocole de Signature*, but there are a number of cases, of which the two Hague conferences are the most important, where this was not done and the reservations were merely mentioned at the time of signature, being sometimes stated in terms and sometimes merely by reference to the record of the meeting at which the reservation was originally announced. There can be no doubt that the former course is preferable. Not only does it make the position perfectly clear both as regards the nature of the reservation and the fact of its acceptance by the other signatories, which the other method does not do, but it is much more convenient to have all the reservations collected together in one document instead of having to search for them through the minutes of the conference. The latter point may be well illustrated by a reference to the list of reservations to the conventions signed at the Second Peace

Conference which is contained in the minutes of the conference, and reproduced at pages 532-7 of Dr. Pearce Higgins's book. Of the reservations there set out, there are at least eighteen where the nature of the reservation is not stated at all, and in order to ascertain what the reservation actually was it is necessary to hunt through the minutes of the conference and find the record of the meeting at which it was made.

The position is much the same as regards reservations made at the time of deposit of ratifications. Where all the ratifications are deposited at once there is almost invariably a Procès-verbal of deposit, and the general and convenient practice is to insert the reservations in that document. Where the ratifications are deposited at different times, this is not always possible, and some of the instances quoted above indicate the sort of difficulties which then arise.

The most difficult case arises where a convention is left open for signature after the date on which it was originally signed, or where there is an accession clause. In the first case the position can sometimes be regularized on the deposit of ratifications, but otherwise there is no occasion on which representatives of all the contracting Powers meet and can deal with reservations which have been proposed since the conference separated; but, if the view of the legal position adopted in this article be sound, it is essential that the consent of the other signatories should in some manner be obtained in such cases before a reservation can be made.

The point is likely to come up with increasing frequency at Geneva, for conventions negotiated there almost invariably contain provisions under which states which were represented at the conference which produced the convention, Members of the League of Nations, and other states to whom the convention is communicated may sign the convention during a period of usually about six months from the close of the conference, or may accede to it after the end of the period for signature. It is evidently desirable that some procedure should be devised for dealing with reservations made by these states. On the one hand, it may be argued that a state which was not represented at the conference, or, if represented, did not sign on the appointed day, cannot expect any facilities as regards reservations; but, on the other hand, the state may have had perfectly good reasons either for not attending or for not signing on the appointed day,

and it is undesirable that it should be debarred from becoming a party to the convention on account of a reservation which might well have been accepted if it had been made in time. In these circumstances, attention is drawn to the procedure adopted at the International Conference on Customs Formalities which met at Geneva in 1923. At the end of that conference the question of reservations was fully discussed, and the reservations which the conference was prepared to allow to be made were embodied in a separate protocol, which was to "have the same force, effect and duration as the convention of to-day's date, of which it is to be considered as an integral part." The protocol contained the following passage :

"In view of the special circumstances in which they are placed, the Governments of Spain, Finland, Poland and Portugal have stated that they reserve the right of excepting Article 10 at the time of ratification and that they will not be bound to apply the said Article until after a period of five years from this day.

"A similar declaration has been made by the Governments of Spain, Greece and Portugal in respect of paragraph 8 of Article 11 of the Convention, and by the Governments of Spain and Portugal in respect of paragraph 3 of the same Article. The Government of Poland has made a similar declaration in respect of the application of the whole of the same Article, with the exception of paragraphs 1, 2, 4, 5, 7 and 9, which it agrees to apply as from the coming into force in its own case of the said Convention.

"The other Contracting States, while stating their acceptance of the reserves so formulated, declare that they will not be bound, in regard to the States which have made the said reserves, as regards the matters to which they relate, until the provisions in question are applied by the said States.

"Any exceptions which may subsequently be formulated by other Governments, at the time of their ratification or accession, with reference to Article 10, Article 11, or any particular provisions of those Articles, shall be accepted, for the period referred to in the first paragraph above, and subject to the conditions laid down in the third paragraph, if the Council of the League of Nations so decides after consulting the technical body mentioned in Article 22 of the Convention."

This procedure seems to possess some marked advantages. It lays down clearly what is submitted to be the right principle, that every reservation must be the subject of definite acceptance by the other signatories; it places definitely on record the reservations made and the consent of the other signatories thereto; it eliminates, at any rate by implication, the possibility of further reservations on the deposit of ratifications by original signatories, and it goes some way in the direction of providing machinery for dealing with reservations by subsequent signatories

in a manner which not only places such signatories in the same position as regards reservations as the states who originally signed, but also ensures the acceptance of reservations which are consistent with the intentions of the original signatories, but no others. It is, perhaps, on some such lines that a solution of the difficulty may be found.

NATIONALITY OF CLAIMS

By SIR CECIL J. B. HURST, G.C.M.G., K.C.B., K.C.

THE rule that a state must not accord diplomatic protection to foreigners against their own Government seems simple and obvious. Its application in practice is less easy. The records of any claims commission will show that considerable ingenuity is sometimes expended in trying to persuade the members of the Tribunal to disregard the rule and award compensation which will enure to the benefit of individuals who are nationals of the defendant Government, in short, to give an award compelling a Government to pay compensation to its own nationals. Furthermore, cases arise in which at first sight it seems unjust that the Tribunal should not award compensation in such circumstances.

A claim came before the Pecuniary Claims Commission between Great Britain and the United States at Washington in 1925, which illustrates the strength of the arguments which can be put forward in disregard of what must appear to be the implications of the sound rule that a state can only intervene on behalf of its own nationals. The claim is one which was dismissed on the merits and, therefore, the nationality point did not arise and is not touched on in the decision of the Tribunal, but the arguments addressed to the Tribunal on the point whether the nationality of some of the beneficiaries did not necessarily invalidate their share of the claim covered a wide field and led to the examination of most of the relevant authorities. They provide a fruitful field of study.

The facts of the case were that in 1875 an American citizen of the name of Studer obtained a grant of land from the native ruler of one of the Malay States. He alleged that the successor of this ruler ignored the concession and deprived him of the property rights which he had acquired under the predecessor's grant. In 1894 the claimant addressed a memorial to the Acting Governor of the Straits Settlements, setting out his complaints, and a few weeks later addressed another memorial to the Secretary of State of the United States. On November 30, 1896, the United States Ambassador in London communicated to Lord Salisbury, who was then Secretary of State for Foreign Affairs, a note from the Secretary of State at Washington, enclosing

a statement of the claim. There ensued at intervals an interchange of diplomatic notes between the two Governments, lasting over a period of some ten years, and ultimately it was agreed that the claim should be submitted to arbitration under the terms of the Pecuniary Claims Agreement of 1910. The agreement to arbitrate the claim became binding as from April 26, 1912. The Memorial of the United States Agent was filed on September 30, 1913. The case was argued for the first time before the Tribunal during April, 1914, but no award was issued. It was argued again during March, 1925, and a decision was given on the 19th of that month.

The general rule as laid down by the text-book writers is that a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that the title to such claim must have remained continuously in the hands of citizens of that Government until the time of its presentation for filing before the commission.¹

The claimant, Studer, was alive at the time when the United States Ambassador in London brought the claim to the notice of the Foreign Secretary in 1896, but he died in 1900, before any agreement was reached for the arbitration of the claim. He died intestate, and his property passed to his children, viz. four daughters and one son. Letters of administration of the estate were taken out by one of the daughters. The other three daughters were married to British subjects and were thus possessed of British nationality at the time when they acquired an interest in the claim. Upon these facts the British Agent contended that even if the claim was good on the merits (which the Tribunal ultimately held not to be the case) the Tribunal could only award one-fifth of any sum which might be held to be the proper amount of compensation to each of the two American heirs, and that as to the remainder, the claim must be dismissed. The American Agent contended that the whole amount of any such sum should be awarded and that it would be for the United States Government to account for this sum to the heirs irrespective of their nationality.

Before passing to the various decisions which were quoted in the course of the argument, it may be well to say that by the

¹ Ralston, *International Arbitral Law and Procedure* (1910), p. 105; Hyde, *International Law chiefly as applied by the United States* (1922), Vol. I, p. 275; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 627.

terms of the Pecuniary Claims Agreement of 1910, the members of the Tribunal were to decide the cases brought before them "in accordance with treaty rights and with the principles of international law and of equity." Nothing was said in the Claims Agreement as to the nationality of the claims or of the claimants. Article 1 merely provided that either party might within a specified period present the claims which it desired to submit to arbitration. In the rules of procedure it was laid down that in the case of claims put forward on behalf of private individuals, corporations, or societies, other than claims arising out of treaties with Indian tribes or nations, the memorial should set out the name and nationality of the claimant, or, where the claimant was dead, of his representatives, with the evidence in support of such nationality.

At the time of the first hearing of the claim in 1914, the United States filed a Memorandum of Oral Argument contesting the principle contended for in the printed British Answer to the Memorial of the United States, that it was a settled principle of international law that to justify the presentation of a claim on behalf of the descendants of an original claimant, the heirs must be of the same nationality as the ancestor and must have been so throughout the intervening period.

In this Memorandum it was maintained that the basis of justification of diplomatic intervention by a state on behalf of individuals is the injury done to the claimant state growing out of the injury to one of its citizens. The injury done to the individual is an injury done to the state and remains unatoned until the claim is satisfied.¹

It was also contended that the restrictive rule requiring the claim to have belonged to nationals of the claimant Government both at the time of its origin and at the time of its presentation and throughout the intervening period, was founded on decisions given by Tribunals whose jurisdiction was established by agreements providing for the submission of claims "on the part of corporations, companies or private individuals, citizens of the claimant Government," or words to the same effect, and was not applicable in the case before the Tribunal. The rule was said to be unsound in principle, unjust where the change of nationality resulted from an involuntary transfer by operation of law, incon-

¹ Vattel, Book II, cap. 6 ; Phillimore, *International Law*, Vol. III, p. 18 ; Ralston, *Venezuelan Arbitrations*, 1903, p. 439 ; Moore, *International Arbitrations*, p. 2348.

sistent with itself, and wholly impracticable. Furthermore, the decisions were said not to be uniform, and attention was called to certain decisions given by the French-Venezuelan Claims Commissions in 1902 and 1903.¹ Reference was also made to the Halley decisions by the Commission under Article 12 of the Treaty of Washington, 1871,² where it was held that in the case of a British claim on behalf of the heirs of a claimant exclusively British it was immaterial that the heirs were American citizens as well as British subjects. Reference was also made to the Alsop case of 1910.³

This vigorous assault upon the rule laid down by the textbooks was supported by references to the reasoning employed in several dissenting opinions given by members of claims commissions who disagreed with the views of the majority of their colleagues. In particular, attention was directed to the arguments employed by the British Agent in the Stevenson case before the Anglo-Venezuelan Claims Commission in 1903,⁴ and to the language which Mr. Ralston employed when sitting as Umpire in the Italian-Venezuelan Commission in 1903 in the Corvaia case.⁵

The Stevenson claim was one put forward by the Government of His Britannic Majesty against the Venezuelan Government on behalf of the descendants of a British subject who had been resident in Venezuela for many years and who died before his claim was arbitrated. He had settled in Venezuela without being naturalized, he had married a Venezuelan and left a family of twelve children, ten of whom were born in Venezuelan territory and two in British. By Venezuelan law the widow and the children born in Venezuela were Venezuelan citizens. By British law they were British subjects.

The principle contended for by the British Government in the Stevenson case was that compensation is demanded upon the basis that a wrong has been done to the property of the subject of the demanding state by the state on which the demand is made. The injury done to the subject is an injury done to the state, and remains unatoned until the claim is satisfied. The

¹ See Massiani case in Ralston's *Report, French-Venezuelan Commission, 1902*, pp. 217, 462, and 492; Daniel case in Ralston's *Venezuelan Arbitrations of 1903*, p. 507.

² Howard's *Report, Parly. Paper, North America*, No. 2 (1874), pp. 15, 325.

³ *British and Foreign State Papers* (1911), Vol. 104, p. 843; *American Journal of International Law*, (1911), Vol. V, p. 1079.

⁴ Ralston's *Venezuelan Arbitrations of 1903*, p. 439.

⁵ *Ibid.*, p. 809.

basis of the governmental intervention being the wrong done to the state, any change in the person or nationality of the individual who has borne the loss or seeks to benefit by the presentation of the claim is immaterial. This reasoning was considered at length by Mr. Plumley, the Umpire in the Anglo-Venezuelan Commission, who rejected it decisively in his judgment. The Umpire, after stating the principle contended for by the British Government, said :

“ This places the claim for an allowance before the Commissioners not on the status of the claimants before this Commission as determined by the Protocol of February 13, 1903, but rather on the unatoned indignity to the claimant Government through the injuries wrought upon Mr. Stevenson by the respondent Government in his lifetime.

“ Had Mr. Stevenson been unmarried and without heirs ascending, descending or collateral, the indignity would still be unatoned ; but could there be a claim of a British subject before this tribunal under the protocol and there be no British subject living to be a beneficiary ? Subsequent to the happenings of those indignities to the British Government through J. P. K. Stevenson, if he had joined the revolutionists and fought the Republic of Venezuela the indignity to the British Government would have remained unatoned, but could the claim survive before this Commission ?

“ Similarly, if, subsequent to the events complained of, Mr. Stevenson had renounced his British allegiance and had become a naturalized citizen of Venezuela ; or if, subsequently to said events, he had removed from Venezuela to the United States of America, for instance, and there sought and obtained citizenship by naturalization, what would have been the status of this claim before this Commission ? Had this claim been assigned by Mr. Stevenson in his lifetime, or by his widow and heirs subsequent to his death, to a Venezuelan citizen at any time prior to February 13, 1903, would it have had standing before this Commission ? In these hypothetical cases the right to reclamation turns upon the act of forfeiture by the claimant or his representatives which deny the right of the parent country to intervene. May it not as well turn upon the death of all those for whom Great Britain has a right of intervention ? Is it not essential to jurisdiction in this Commission that the right to intervention shall exist at the time of the happening of the events complained of and at the date of the protocol creating this Commission ? ”

The passage from Mr. Ralston's judgment in the Corvaia case ¹ was as follows :

“ If the proposition now presented were one of first impression the umpire would approach its study with a strong disposition to recognize the jurisdiction of the Commission over claims which had by regular course of inheritance now become vested in Italian (*sic*) citizens, for he would recognize that to refuse—to illustrate—jurisdiction in a French Commission because a claim, although French in origin, was now owned by Italian citizens, and to refuse jurisdiction

¹ *Ibid.*, p. 809.

over the same claim in the Italian Commission because, although now Italian in ownership, it was French in origin, would be to perpetrate an injustice. The umpire does not, however, find himself free. A long course of arbitral decisions has emphasized the fact that the claim must be both Italian in origin and Italian in ownership before it can be recognized by an Italian Commission." (See Moore's *Arbitrations*, pp. 1353, 2254, 2753, 2757.)

The United States Memorandum of Oral Argument maintained that the Stevenson case and the Corvaia case were not applicable to the Studer case under consideration by the Tribunal in 1925, because they were based upon the wording of the protocols setting up the Venezuelan Claims Commissions, all of which limited the jurisdiction to claims by nationals of the claimant Governments.¹

When arguing before the Tribunal in 1925, counsel for the United States submitted propositions less far reaching than those contained in the printed Memorandum of Oral Argument filed in 1914. In 1925 it was admitted that at the time the claim arose the person on whose behalf the claim was submitted must possess the nationality of the claimant Government. This excludes all right of a Government to put forward claims on behalf of an individual who obtains its nationality by naturalization if the claims arose before the naturalization. The contention advanced before the Tribunal was limited to the proposition that where a claim, national in origin, passes as to part of the claim by operation of law to non-nationals, no rule of international law prevents the claimant Government collecting the whole amount of the claim and paying it over to the representative of the deceased, who will then distribute their share to the beneficiaries who are non-nationals of the claimant state.

Limited in this way, the point at issue before the Tribunal was reduced to a very narrow compass. It was agreed that of the five beneficiaries who had succeeded to the rights of the claimant, two were United States citizens and three were British subjects. It was agreed that the point must be decided in accordance with international law. The point at issue was, therefore, limited to the question whether, if the claim was good, the Tribunal had jurisdiction to make an award which could include the shares of the three British beneficiaries, or whether those shares must be excluded. Nevertheless, the question in this limited form raises the issue whether in the

¹ As to this point, see *post*, p. 174.

absence of any special consent a Government can consistently with sound principle be obliged by an international tribunal to pay compensation to its own nationals.

For Great Britain it was contended that to formulate the proposition in the terms submitted by the United States was to put the case the wrong way round. Three of those who claimed to share in any award, being British nationals, subjects of the state which was being asked to pay compensation, the point was not whether there is any rule of international law which prevents, but whether there is any rule of international law which authorizes another Government to collect the whole amount of a claim of which part will be returned to nationals of the state which has been forced to pay the compensation. The relations between a state and its own nationals are essentially domestic matters. The obligation which is incumbent on every state to respect the independence of another state carries with it the obligation to refrain from interfering in the relations between that state and its nationals. To force a Government to pay compensation to its own nationals is to interfere in the relations between that state and its nationals, and it was, therefore, contended that it lay on the United States to show that international law had recognized an exception to this general principle, that exception covering the case where the interest in a claim or part of a claim passes to individuals who are by marriage nationals of the respondent state. It was contended that international law, as evidenced by the practice of states established by the decisions given by various claims commissions, was uniformly to the effect that an award could be made on behalf of a person who had by marriage become a national of the respondent state.

Every case which counsel could find he cited before the Tribunal, and in each the share of a beneficiary who had acquired a new nationality by marriage was disallowed or withdrawn. Conversely, where by marriage a beneficiary had acquired the nationality of the claimant, the claim was admitted.

The first case cited was that of Grayson, a case which is referred to in the arguments in the claim of *P. S. Wilts v. United States*, No. 313 before the French and American Claims Commission, 1880 : ¹

¹ Boutwell's *Report, French and American Claims Commission*, H.R., 48th Congress, 2nd session, Ex. Doc. No. 235, p. 67.

"In support of the positions taken by the counsel for the United States, the attention of the Commission was called to the proceedings of the British and American Mixed Commission in the case of William G. Ford, administrator. In that case the Commission allowed the claim as and for the interest of Mary G. Barker, who was a legatee under the will of G. J. Robinson, the decedent and original claimant, and rejected the claim of two American citizens, who were also legatees under the same will. The Commission were also referred to the claim of Mrs. Grayson, being No. 291 before the same Commission. Mrs. Grayson claimed as administratrix of the estate of John J. Cowley, her former husband, and, when living, a British subject. After the death of Cowley she intermarried with one Grayson, an American citizen. The Commission disallowed the claim of Mrs. Grayson so far as it was prosecuted in her own right, although she, as well as Cowley, were British subjects by birth."

The next case cited was that of Chopin before the same Commission.¹ Chopin was a French citizen resident in Louisiana, where he died in 1870, leaving as his heirs four children, and the claim was prosecuted before the Commission on their behalf. One daughter had married a United States citizen, and the counsel for the French Republic withdrew so much of the claim as would have enured to her benefit.

Another case was that of Jean Prevost.² Prevost was a French citizen who had a claim against the United States for cotton taken from him during the civil war. He died leaving a widow and three children. The claim came before an international commission, and an award was made for a sum which, as the commission stated, was for the value of the cotton less one-sixth, which represented the interest of a child who had married and whose husband had been naturalized as a citizen of the United States. On the ground that the nationality of the wife followed that of the husband, the commission refused to allow anything in respect of her interest, because she was at the time when the award was rendered a citizen of the United States. In subsequent litigation in the Federal courts against the United States, initiated by a daughter to recover her share, the judge characterized this deduction as unwarranted, but the claim failed on other grounds.

Another claim cited to support the view that change of nationality by marriage affected the jurisdiction of the Commission was that of Calderwood.³

¹ Boutwell's *Report, French and American Claims Commission*, H.R., 48th Congress, 2nd session, Ex. Doc. No. 235, p. 83.

² Moore, *Digest of International Law*, Vol. VI, p. 629; *Digest of International Arbitrations*, Vol. II, p. 1150.

³ *Report of the Mixed Commission under the Treaty of Washington, 1871*, Article XII,

Other marriage cases which may be quoted are Maxan, where the Commission refused to take cognizance of the share which a daughter of the original claimant had inherited, as she had married a Spaniard, and had thereby lost her United States nationality,¹ and Lizardi.²

These were all the marriage cases which had been traced. None of them justified any award to a non-national who had acquired by marriage the nationality of the state from which the compensation was demanded.

The contention advanced on behalf of the United States was that the claim should not be disallowed where the change of nationality was due to operation of law, but the view was contested that a change of nationality due to intermarriage with a foreigner constituted a change of nationality by operation of law. Marriage is as entirely a voluntary act as naturalization, and before the Tribunal it was not contended on behalf of the United States that a change of nationality due to naturalization did not oust the jurisdiction of the Commission.

Two cases where a change of nationality in the beneficiary had been effected by operation of law were cited.

The first was the case of Aubrey.³ The claimant was a coloured woman born in the territory of Louisiana while it was a French colony. When the case came before the Claims Commission she contended that her nationality had not been changed by the transfer of the territory to the United States, because, being a coloured woman, she had not been admitted to citizenship, but it was held by the Tribunal that the effect of the Treaty

North America, No. 2 (1874), p. 18 ; Moore, *Digest of International Arbitrations*, p. 2485. Quoted by Mr. Plumley in the Stevenson decision to show that it was the nationality of the claimant and not the unatoned dignity of the claimant state which was the important element.

Jane Calderwood was an American citizen by birth who had married a British subject resident in the United States. The husband had a claim against the United States, but died before its prosecution. The claim was submitted to the Tribunal by the widow. Counsel for the United States demurred on the ground that the widow was an American citizen, but the demurrer was overruled on the ground that by her marriage she had acquired British nationality and was therefore entitled to claim.

In the case of Brand, before the same Commission (*Ibid.*, p. 20), the converse was held, and a claim against the United States put forward by the British-born widow of a United States citizen was dismissed.

¹ Moore, *Digest of International Arbitrations*, Vol. III, p. 2485.

² *Ibid.*, p. 2483.

³ Boutwell's *Report, French and American Claims Commission, 1884*, p. 65.

of 1803 was to make the claimant a citizen of the United States. The claim was, therefore, disallowed.

The other claim where the change of nationality resulted from operation of law was a bankruptcy case, that of *Ruty*,¹ and the claim was disallowed. *Ruty*, the claimant, was a French citizen who had become bankrupt and all his property passed to an assignee. The claim was disallowed apparently because the commissioners considered that the assignment in bankruptcy passed the title from the bankrupt to the assignee. The nationality of the assignee does not appear.

A foot-note to the decision of the Umpire in Administrative Decision V of the German-American Mixed Claims Commission under the Treaty of Berlin of 1921,² cites the case of *Philips v. McDonald*, 99 U.S. (9 Otto) 298, as if it were an authority for holding that a claims commission could make a valid award in favour of a claimant who had become bankrupt and whose estate had vested in an assignee of different nationality. But the case is no authority for any such proposition. *McDonald* was a British subject resident in the United States whose cotton was burned by the Federal army. In 1868 he went bankrupt and his property became vested in an assignee. In 1873 the Commission, under Article 12 of the Treaty of Washington of 1871, made an award in *McDonald's* favour. Nothing was said to the Commission as to *McDonald* being bankrupt or as to his property being vested in an assignee or as to that assignee being of the nationality of the respondent state.³ The award was made and the money was paid over. The assignee subsequently initiated proceedings to establish his right to the sum awarded as against *McDonald*, and the Supreme Court decided that the American courts had jurisdiction to decide whether the bankrupt or the assignee was entitled to the money.

Examination shows that the authorities upon which the United States relied in favour of their contention that the Tribunal had jurisdiction to make an award without deducting the share of non-nationals were not cases where the change of nationality resulted from marriage. They were cases where some or all of those who succeeded to the claim enjoyed by birth the nationality of the state against which the claim lay. It was

¹ *Boutwell's Report, French and American Claims Commission, 1884*, p. 93.

² *Consolidated Edition of Decisions and Opinions*, p. 186.

³ See *Howard's Report*, p. 55.

admitted that the decisions were not uniform. When looked into it is clear that the majority support the view that the share of any beneficiary who possesses the nationality of the state against which the claim lies is not within the jurisdiction of the commission. This is well illustrated by Foucher's case.¹ Foucher was a French citizen who received an award from a military tribunal. The amount awarded was not paid. In 1869 he died, leaving a widow who was his universal legatee. In 1877 the widow died, leaving nephews and nieces as joint universal legatees. In 1880 the claim was revived before the Franco-American Claims Commission, and a representative of all parties concerned was appointed for the purpose. All the parties interested in the succession were United States citizens except two, who were French. These latter filed a separate Memorial and claimed the whole award. The Supreme Court of Louisiana held that the money awarded should be distributed among all the legatees without regard to their nationality. This judgment was reversed by the Supreme Court of the United States, which held that the award could not be held to enure to the benefit of citizens of the United States. The remarks of Field, J., at p. 521 of Vol. 133, U.S. Reports, are noteworthy. He held that when the award was made it could lawfully be intended for no other persons than those who were citizens of France.

The situation presented by the claims which have come before commissions is frequently complicated by the fact that the beneficiaries were entitled to double nationality, that of both the claimant state and the respondent state. The Stevenson case, quoted above, is a typical example, where all the beneficiaries on whose behalf Great Britain was claiming were British subjects under British law, but the widow and ten of the children were Venezuelan citizens by Venezuelan law.

In two groups of cases the members of the Claims Commission ignored the possession by the beneficiaries of the nationality of the respondent state provided that they possessed the nationality of the claimant state. These cases were the Halley group, decided by the Commission under Article 12 of the Treaty of Washington, 1871,² and the decisions of the Franco-Venezuelan Caracas Claims Commission of 1903. The Caracas Claims Commissions, appointed in 1903, all adopted the same line as that

¹ Moore, *Digest of International Law*, Vol. VI, p. 628.

² Howard's *Report*, *North America No. 2*, 1874, p. 15.

followed by Mr. Plumley in the Stevenson case before the British Commission, with the exception of the French Commission, which was presided over by Mr. Filtz. In three cases before the Franco-Venezuelan Commission, Massiana, Daniel, and Peton,¹ where the original claimant had been French, the claims were allowed without respect to the nationality of the heirs. Mr. Filtz took the view that there was no occasion to examine whether the heirs enjoyed the nationality of the original claimant.

Divergent decisions between different claims commissions cannot be avoided so long as each commission decides finally and without appeal. The two national arbitrators not infrequently differ, and the decision rests with the Umpire. It is inevitable that the individuals who are called upon to preside over these tribunals should sometimes hold different views as to the correct rule to apply.

One noteworthy point about the decisions of the Caracas Commissions of 1903, particularly those given in the British and Italian Commissions, where the decisions show great care in their preparation, is that they controvert the view put forward by the United States in the Memorandum of Oral Argument filed in 1914, that the cases where it has been held necessary that the beneficiaries who have succeeded to a claim should enjoy the same nationality as the original claimant were cases which turned upon the wording of the agreements establishing the commissions. Conventions for the establishment of claims commissions have frequently provided for the submission of "claims on the part of corporations, companies or private individuals citizens of . . ." It was asserted that it was these words of limitation in the text of the agreement which rendered it essential that the beneficiaries should enjoy the same nationality as the original claimant. No such words appeared in the text of the protocols establishing the various Venezuelan commissions in 1903. The texts of the various protocols will be found in Ralston's report.² In general, they adopt the same wording and merely speak of British claims or Italian claims as the case may be.

One arbitral decision to which the United States attached great importance in support of their contention was the Alsop award by His Majesty the King in the dispute between Chile

¹ Ralston's *Report of the French-Venezuelan Commission*, pp. 217, 492.

² *Venezuelan Arbitrations of 1903*.

and the United States in 1911. The function assigned to His Majesty in that case was that of an *amiable compositeur*, and the award which he made set aside the nationality contention advanced by the Chilean Government, which asked for the dismissal of the claim upon the ground that some of the beneficiaries were Chilean nationals, or at any rate that the American nationality of all the beneficiaries was not established. The history of the Alsop claim is as follows :

It was an old-standing dispute between the United States and Chile, and had on two previous occasions been brought before claims commissions appointed to deal with outstanding claims between the two countries. The first commission in 1890 was unable to deal with the Alsop claim within the time at its disposal. The 1894 commission disallowed the claim on the ground that Alsop & Company had no *locus standi*. They were not included within the term "corporations, companies or private individuals citizens of the United States" as the firm had been organized as a partnership under Chilean law and had thereby become a juridical entity possessing Chilean nationality. The dismissal of the claim did not end the dispute. Friction continued and it was ultimately referred to His Britannic Majesty to determine the amount which was equitably due to the claimants. It was held in the Alsop award that in these circumstances the intention was that the claim should be dealt with upon its merits without reference to considerations which would deprive the award of achieving an effective solution of the points at issue.

The functions of an *amiable compositeur* are not well defined in international law, but the King's award in the Alsop case contains the following definition :

"The duty which Your Majesty has been pleased to undertake is one of pronouncing an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side. This is what we conceive to be the function of an '*amiable compositeur*.'"¹

The function is not unlike that of a conciliation commission whose recommendations both parties to a dispute have undertaken to accept in order to terminate the friction to which the dispute was giving rise. It is, in fact, a method of securing the solution of a dispute which might otherwise lead to war. It is obvious that if a dispute arising out of a personal claim was

¹ *British and Foreign State Papers* (1911), Vol. 104, p. 843.

solved by resort to the arbitrament of war, the remedy secured by belligerent action would not be restricted by conditions such as those of the nationality of the individuals concerned, and it is, therefore, not unreasonable that when a dispute is terminated by pacific methods resorted to as a substitute for war, conditions should not be introduced which would not be present in the event of a solution by war, and of which the presence would prevent any solution of the difficulty. As a precedent, therefore, the Alsop case does not establish the thesis that a claims commission can ignore the nationality of those who would benefit by any award which may be made. Submission of a dispute to a claims commission implies that what is submitted to the Tribunal is the claim of the individual on whose behalf the state is acting.¹ The remedy of resort to a claims commission is misconceived if the claim is put forward on any other basis, and if the basis on which a claim is put forward is limited to action on behalf of the individual sufferer, the individual sufferer must be one on whose behalf the state is entitled to intervene, i. e. the sufferer must possess the nationality of the Government interesting itself in the claim.

Two interesting cases have come before the Anglo-German Mixed Arbitral Tribunal set up in London under the provisions of the Treaty of Versailles, in which the effect on the claim of the nationality of the beneficiaries has come in question.

The first is that of *Klingenstein v. Maier* (case 946). By Article 296 of the Treaty of Versailles, provision was made for the establishment of a clearing office through which pre-war debts owing by nationals of the one party to nationals of the other party were to be paid. The British executors of a deceased British creditor domiciled in England claimed payment of a debt owing to the testator by a German national. It appeared that under the will several persons of German nationality and others of American nationality, as well as British nationals, were entitled to substantial benefits, and it was contended before the Mixed Arbitral Tribunal, before which the claim came in accordance with paragraph 16 of the Annex to Article 296, that the claim could only succeed as to so much of the debt as corre-

¹ Cf. the language of Parker, Umpire, in Decision V of the *German-American Mixed Claims Commission, Consolidated Report*, p. 164: "The United States in doing this does not seek revenge for an injury inflicted upon the nation as such; it seeks financial compensation for the individual who has suffered the loss or damage."

sponded to the proportion of the testator's estate to which beneficiaries of British nationality would be entitled. The Mixed Arbitral Tribunal decided that its function was to determine whether or not there was a debt owing within the meaning of Article 296, and that it was not its duty to inquire in any particular case into the ultimate destination of funds which a British or German national might seek to recover before it. It was for the forum of the creditor's own country to determine when necessary what rights, if any, other persons might have against him or his estate in respect of the sums recovered through the machinery of the treaty.

Under Article 296, the Mixed Arbitral Tribunal was in fact only dealing with debts which, in normal circumstances, would be recovered through the courts of law, and in the courts of law no question of the nationality of the beneficiaries would arise. The functions of the Mixed Arbitral Tribunal under Article 296 being merely those which would in normal circumstances be performed by the courts of law, no sound principle exists why considerations which would not be admitted in a court of law should affect the decision.

The second case is that of the executors of *F. Lederer v. the German Government* (Claim No. 439).

This claim arose under Article 297 of the Treaty of Versailles. Article 297 deals with claims for compensation in respect of damage or injury inflicted upon the property, rights or interests of Allied nationals in Germany resulting from the application of exceptional war measures. Such exceptional war measures comprised all the measures which were taken with regard to enemy property during the war, in the nature of the supervision, compulsory administration or sequestration of such property, or which involved the seizure or use of or interference with enemy assets. Measures of this kind were all taken in the enemy country as the result of legislation which would be binding on all persons and property within the enemy territory and were, therefore, measures which were valid by the law prevailing in the country where the property was situated. But for the treaty there would be no remedy for any injury to property by the application of these measures, and by the terms of Article 297 (e) the persons who were entitled to compensation in respect of damage to their property arising from such measures were to be nationals of the Allied and Associated Powers.

The First Division of the Anglo-German Mixed Arbitral Tribunal held that the protection conferred by this Article 297 (e), being limited to Allied nationals, the Tribunal would recognize the capacity of an executor under the will of a British national who died after the treaty came into force to claim under this provision, but would not in its award go further than was necessary to ensure the compensation due to British beneficiaries. It will, of course, be easy to argue that in this case the decision of the Tribunal was based entirely on the wording of the Treaty of Versailles, which, by the terms of the provision in question—Article 297 (e)—was limited to Allied nationals, but it can also be maintained that as the remedy provided by the treaty is one which could only have been put forward through the diplomatic channel, the intention of the treaty was to establish a remedy subject to the same limitations as those which would apply to a claim through the diplomatic channel.

A decision of the German-American Mixed Claims Commission, set up by the Agreement of August 10, 1922, to deal with all claims by the United States against Germany under the Treaty of Berlin of August 25, 1921, should be compared with that of the Anglo-German Mixed Arbitral Tribunal in *Lederer v. the German Government*.

Cases before the German-American Mixed Claims Commission do not come before the Umpire unless and until the national arbitrators have disagreed. In Administrative Decision No. II of November 1, 1923, dealing with the functions of the Commission and announcing fundamental rules of decision, the Umpire held that "In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership." By a later decision of October 31, 1924,¹ the moment up to which the claim must remain in American hands was determined. The Umpire held that the correct interpretation of the Treaty of Berlin was that that moment was the coming into force of the treaty. Through that treaty the United States acquired rights on behalf of its nationals, and Germany assumed corresponding obligations. The rights were acquired on behalf of those who were at that moment American nationals, and not on behalf of

¹ *Consolidated Edition of Decisions and Opinions of the Mixed Claims Commission, United States and Germany*, p. 145.

those who had been or might become American nationals, and the rights thus fixed constituted property, the title whereof passed by succession, assignment or other form of transfer.

The German member of the Commission had held that the ordinary rule of international law established by the various decisions which have been referred to in the earlier part of this article must be read into the Treaty of Berlin and necessitated proof that a claim was in American ownership at the date when the Commission gave its decision. The Umpire decided against this view: the award which he rendered was based on the provisions of the Treaty of Berlin, but in the course of it he reviewed the decisions which the German Commissioner had relied on, and came to the conclusion that the principle they laid down was only a rule of practice, and could not be invoked so as to destroy substantive rights which had vested under the treaty. The basis of the Umpire's decision being that the rights of the individual claimants were fixed by the Treaty of Berlin and became definitive at the moment when the treaty came into force, renders it inapplicable to the case of a claim coming before an ordinary claims commission, but the passages in the judgment in which he refers to the various decisions on which the German Commissioner relied, all of which are quoted in the earlier part of this article, show a distinct tendency to diverge from the view which prevailed in the decision in *Lederer v. the German Government*¹ and which is generally laid down in the text-books, that in the absence of some other rule agreed between the Governments concerned, the claim must remain in the hands of persons enjoying the nationality of the claimant state up to the moment when it comes before the claims commission to which it is submitted.²

What that moment is is another matter of some difficulty.

¹ *Supra*, p. 177-8.

² The *Journal du Droit international privé* (Clunet), 1924, p. 359, contains an interesting article by M. Oudinot on the effect on the right to share in reparation payments made by Germany to France produced by changes of nationality. The distribution of such payments is regulated by French law and not by international law, but the provisions of the French law on the subject were a little vague and the conclusions reached were based on principle. The conclusions reached are that to share in the reparation payments a person must have been French at the moment when the damage was done, and must enjoy French nationality continuously. The only exception is where France has concluded a treaty with another Allied state for reciprocal admission of nationals to reparation benefits, and a foreigner in France is entitled to the benefit of that treaty.

Different authors use different words to express it. Professor Borchard's word is "presentation,"¹ and "presentation" refers to the entering or filing in the register of the commission, not to the moment at which the evidence or arguments are presented to the Commission.² Professor Hyde's word is "preferment."³ "Espousal" is another word which is used,⁴ and commissions have been urged to hold that change of nationality in the beneficiary is immaterial from the moment when the claimant Government accepts the claim as one to be put forward and *vis-à-vis* the foreign Government substitutes itself for the individual national concerned.⁵

With deference to these learned authors, it is submitted that the test they lay down is too narrow. The truer view is indicated in the judgment of the Supreme Court of the United States in the case of *Burthe v. Denis*,⁶ when, speaking of the French-American Claims Commission, it says that that body possessed no authority to consider any claims except as held both at the time of their presentation and of judgment by citizens of the other country. The beneficiaries must possess the nationality of the claimant state at the time the claim is put forward, because in the absence of such nationality the state is not justified in putting forward the claim; but the beneficiaries must also possess the nationality of the claimant state from the time of presentation up till the making of the award, because up till that moment it is open to a tribunal to admit and take into account any evidence that is submitted by either Government to support or to resist a claim. Up till that moment it is open to the respondent Government to show that the nationality of a beneficiary has changed, and proof of that fact may affect the jurisdiction of the tribunal.

After the award has been issued the position is different.

¹ "The conclusion is inevitable that under ordinary circumstances a claim to be considered a national claim must be national both in origin and at the time of presentation." (*Diplomatic Protection of Citizens Abroad*, p. 666).

² Ralston, *International Arbitration*, § 220, p. 105.

³ "A state should not undertake to press a claim for redress in behalf of an individual against a foreign Government unless he was one of its own nationals both at the time when the claim arose and continuously thereafter until its preferment." (*International Law*, Vol. I, p. 479).

⁴ See the discussion on this subject in the opinion of the American Commissioner on Administrative Opinion V of the *German-American Claims Commission*, 1925, pp. 164, &c.

⁵ See Borchard, *op. cit.*, p. 356.

⁶ 133 U.S., 514, 1890.

The parties to an agreement setting up a claims commission usually stipulate that the decisions shall be final, and even where there is no such stipulation, there is the implied obligation to submit loyally to the award. From the moment the award is issued, the rights of the parties are fixed and, as regards the Government in whose favour the award is made, there is substituted for the previous right to claim compensation for the benefit of one of its nationals a right to receive what is in the nature of a judgment debt. If rights accruing under awards could be modified by subsequent changes of nationality on the part of the ultimate beneficiaries, finality would be destroyed.

Before the award no such considerations apply, and the practical inconveniences of taking presentation of the claim as the decisive moment is illustrated by such a case as the Hawaiian claims before the Anglo-American Pecuniary Claims Commission under the Agreement of 1910. The Hawaiian claims were "presented," in the sense of being listed and agreed between the two Governments as claims to be arbitrated, on July 6, 1911. This list was confirmed and made binding on April 26, 1912. The claims were not heard until November, 1925. In the meantime several of the claimants had acquired American nationality by naturalization. If presentation is the only crucial date, the claims of these persons might have been heard by the Tribunal despite their change of nationality. The British Government took a different view and withdrew them.

The possibility of excluding the application of the usual rules with regard to the nationality of beneficiaries when two states set up a claims commission to deal with outstanding claims between them is recognized in the decision of the Umpire in the Orinoco Steamship Company claim before the American-Venezuelan Claims Commission in 1903.

An English company called the Orinoco Shipping and Trading Company had for years been pressing some claims on the Venezuelan Government. On April 1, 1902, the English company sold its claims to an American company. The protocol establishing the American-Venezuelan Claims Commission was signed on February 17, 1903, and the language in Article 1, "all claims owned by citizens of the United States . . . shall be examined and decided by a Mixed Commission," was held by the Umpire to have been used by the framers of the treaty with the intention of excluding the normal rule and of enabling the Commission

to make an award in a claim for compensation where the injury was not done to a national of the state putting forward the claim.¹

In conclusion, the following propositions may be formulated.

A claims commission must apply the following rules as to the nationality of the beneficiaries on whose behalf a claim is submitted to it unless the two Governments have by the terms of the agreement stipulated for the application of some other rule :

(a) The person who suffered the injury out of which the claim arose must have possessed the nationality of the claimant state and not have possessed the nationality of the respondent state at the time of the occurrence.

(b) If the claim is put forward on behalf of the person who suffered the injury, he must possess the nationality of the claimant state and not possess the nationality of the respondent state at the time when the claim is submitted to the commission and continually up to the date of the award.

(c) If the person who suffered the injury out of which the claim arose is dead or has parted with his interest in the claim, the person to whom the interest has passed and on whose behalf the claim is presented must possess the nationality of the claimant state and not possess the nationality of the respondent state at the time when the claim is submitted to the commission and continually up to the date of the award.

(d) Where a national retains part only of the interest in a claim and part passes to a non-national, the claim may only be presented and an award made in respect of so much of the claim as remains vested in the national.

(e) The result is the same whether the non-national's interest in the whole or part of a claim passed to him by voluntary or involuntary assignment or by operation of law.

(f) Changes of nationality subsequent to the making of the award are immaterial.

¹ Decision of Barge, Umpire ; Ralston's *Report of the Venezuelan Arbitrations of 1903*, p. 84.

OBITUARY

GEORGE GRENVILLE PHILLIMORE

THE name of George Grenville Phillimore, who died on September 20, 1925, has long been known to students of international law. He was born on August 28, 1867, second son of Admiral Sir Augustus Phillimore, K.C.B., and Harriet Eleanor, daughter of the Hon. Matthew and Lady Louisa Fortescue. He was educated at Westminster and at Christ Church, Oxford, where he took first class Honours in Moderations and the final Classical School and proceeded to the degrees of B.A., M.A., and B.C.L.

He was called to the Bar in 1891 and joined the Western Circuit and practised there and in the Admiralty Court.

From 1905 to 1912 he was an assistant Charity Commissioner for conducting inquiries into the endowed charities of the west country. From 1912 to 1914 he was on the legal staff of the National Insurance Commission. In the latter year he was appointed District Probate Registrar of the High Court of Justice, first at Bristol and afterwards at Winchester. Then he became a J.P. for Hampshire.

He married in 1893, May Melba, younger daughter of the late Henry William and Annie Sophia Franklyn, and had two sons—both of whom served in the war, the younger being killed—and one daughter. His wife survived him but a short time, dying on November 26, 1925. From 1914 onwards, George Phillimore resided at Shirral House, Shedfield, Hants, and interested himself greatly in matters of local interest and those concerning the Church, to which he rendered great service; and he was much honoured and beloved as was shown when he passed away.

This article, however, proposes to deal only with his connexion with international law.

Having been previously assistant-secretary, he became in 1896 one of the honorary general secretaries of the International Law Association, and from that time onwards never missed attending a conference till that held at Stockholm in 1924, when he was detained by the death of his mother. None of those members of the Association, whether British or foreign, who attended these conferences will forget his charm of manner, his ready sympathy, his modesty, his sociability, or the zeal and knowledge which he showed.

His most important contribution to the study of international law was his joint editorship with Sir Alexander Wood Renton of *Burge's Commentaries on Colonial and Foreign Laws*. He was also assistant-editor of Williams' and Bruce's *Admiralty Practice*, contributed many articles to the *Encyclopaedia of the Laws of England* (edited by Sir Alexander Wood Renton) and assisted the writer in the composition of the articles on Admiralty Jurisdiction in the 11th edition of the *Encyclopaedia Britannica*.

He also wrote a number of papers, three for conferences of the International Law Association, on Foreign Judgments, Treatment of Prisoners of War, and

International Railway Transport. To the *Journal of Comparative Legislation* between the years 1900 and 1923, he contributed papers on Martial Law in Rebellion, Booty of War, What is a State of War in Law, International Railway Transport, Trading with the Enemy, Contraband of War, Nationality of Married Women (two papers), the Freedom of the Seas, Codification of Private International Law, and Laws of War; and to the *Law Magazine*, A General Arbitration Treaty between England and France, British Prize Law, The Hamburg Maritime Law Conference, The Congo State (a review of the international position), The Amsterdam Maritime Law Conference, and Church and State; and to the *Grotius Society* (of which he was one of the founders), Bombardments, The Future Law of Neutrality, Treatment of Prisoners of War (in conjunction with Dr. Bellot), and Some Suggestions for a Draft Code for the Treatment of Prisoners of War.

Many will recollect his participation in the Conference of the International Law Association at Buenos Ayres in 1922 and the eloquent speech he made on that occasion.

Only this year in July, when he was already suffering from the disease which brought about his death, my cousin gave a series of lectures on *Les Immunités des États en matière de juridiction et d'exécution forcée*, which were delivered in French to a large audience at the annual session of the Académie de Droit International at The Hague.

His premature death brought to a close a career of great value and a life full of sympathy and of devotion to the public weal. Much loved and much regretted both by his family and by a large circle of friends.

Quis desiderio sit pudor aut modus?

PHILLIMORE.

SIR ERSKINE HOLLAND, K.C.

WHILE the present number of the *Year Book of International Law* was passing through the press the death was reported of Sir Erskine Holland, formerly Chichele Professor of International Law and Diplomacy in the University of Oxford. A full note of the great services which Sir Erskine Holland rendered to international law will appear in the next number of the Year Book.

NOTES

AN AUSTRALIAN OPINION ON ARTICLE 15 (8) OF THE COVENANT OF THE LEAGUE OF NATIONS

DURING the debate in the Australian Parliament (September 11, 1925) on the Report of the Australian Delegates to the Fifth Assembly of the League of Nations, September 1924, an important speech was made by Mr. J. G. Latham, C.M.G., K.C., M.P. (now Attorney General in Mr. Bruce's Government). After pointing out what is little realized, that the expenditure of £250,000 hitherto incurred by Australia in virtue of her Membership of the League was altogether insignificant in comparison with her saving on defence in virtue of the practical denavalization and demilitarization of the ex-German islands in the Pacific (over 700 of which Japan holds under mandate), Mr. Latham dealt with some current misconceptions as to the protection afforded, e. g. to Australia by Article 15 (8) of the Covenant :

“A great deal of discussion has taken place on domestic jurisdiction, and I should like to take this opportunity to submit to the House some considerations and ideas upon that subject. Article 15 of the Covenant provides that the Council shall, if possible, settle any dispute submitted to it. Paragraph 8 contains this important provision :

‘If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.’

This paragraph is of great importance to Australia. It appears to me that it is looked at in a very superficial manner, and that many Australians consider that, as Australia is a party to the Covenant, they can disagree with other nations on any matter of domestic jurisdiction and still enjoy the protection of the League of Nations. I shall analyse the paragraph to discover its precise meaning. The phrase ‘a matter which by international law is solely within the domestic jurisdiction of a party’ is in itself an undefined phrase. It did not exist in international law before the signature of the Covenant. It appears to be universally agreed that immigration is a matter which by international law falls solely within domestic jurisdiction. It is sometimes said that if a matter out of which a dispute arises is within the domestic jurisdiction of a state, any war on that matter must necessarily be wrong, and be an international crime. I should like honourable members to consider the position for a moment. We all know that wars frequently arise out of the treatment in a foreign country of nationals of one of the belligerents. Let me remind the House that one circumstance which brought about the Boer war was the treatment of the Outlanders in the Transvaal. I do not wish to discuss the theory that all wars are brought about by economic causes and because men want money.

. . . There is no doubt that the franchise and legislation for a poll tax are essentially domestic matters. It is within the power of the Australian legislature to impose a poll tax on certain nationals, and our courts would uphold such an action. International law recognizes that we have power to do that, and yet it might be most unjust and might well afford proper grounds of protest to some other nation. What would happen if we were to provide that every national belonging to a self-conscious, active, and powerful Power, and engaged in any work in our country, say, in a factory, should be subjected to inspection, and should obey certain rules as to hours of work which applied to the nationals of no other country? That has been done in the case of one country, and is a matter of domestic jurisdiction; our right to do it has not been challenged. It is for us to say what factory laws we shall make; but are we going to contend that this well-armed, active, and powerful nation would have no right to object to such action, and that it could not possibly be a just cause for war?

MR. SCULLIN.—The making of laws in this country would not justify any other nation in going to war with us.

MR. LATHAM.—The solution of the problem is not so simple and easy as the honourable member suggests. What would we do if our own nationals were treated in the same way in a foreign country? A simple and easy solution would not apply in the case of the Germans in Poland, to whom reference has been made, or to the Poles in Germany. . . . A decision that a dispute arises out of a matter which falls within the domestic jurisdiction of a party according to international law, determines only the question of the legal power, and not the question of moral justice. It has been commonly supposed that the provisions of paragraph 8 of Article 15 of the Covenant make it impossible for the question of a White Australia to be raised or discussed before the League of Nations. Upon that I desire to say a few words. Paragraph 8 of Article 15 provides that if a dispute is claimed by one of the parties to be what is called a domestic matter, and is found by the Council to be such a matter, then the Council shall so report, and shall make no recommendation as to the settlement of the dispute. It is obvious that the fact that one party claims that a matter is one within its domestic jurisdiction does not settle the question. The Council has to go on and determine whether or not that claim is well founded. Various heads might be suggested under which a question of domestic jurisdiction might arise. The matter in respect of which the claim is made might be immigration, the franchise, or the question of land holding. The Council has to go into the question and find out whether it is a matter which according to international law falls within the domestic jurisdiction of one of the parties. . . .

If a question arose before the Council as to whether the immigration policy of Australia was a matter of domestic jurisdiction, the Council would have to determine that. It has sometimes been argued in Australia that as Great Britain is a permanent member of the Council, her representation will always prevent a determination adverse to Australia being arrived at, and that therefore we may always rest secure in the belief that our position is effectively safeguarded by the domestic jurisdiction provisions. That is not the case. In the first instance, it is very doubtful whether Great Britain

or other nations would think it proper that she should be represented at a sitting of the Council on any matter affecting one of her dominions.

MR. COLEMAN.—Or other parties to the dispute either.

MR. LATHAM.—Or other parties to the dispute, as the honourable member suggests. In the *Official History of the Peace Conference*, published under the auspices of the British Institute of International Affairs, the view is expressed that as a matter of course Great Britain would not sit at the Council when a dominion matter was brought up, as though she were a disinterested party. Again, when a matter is before the Council for determination, Article 5 of the Covenant provides that a decision of the Council shall be taken unanimously. There is a proviso under Article 15 shutting out the interested parties, but apart from that all decisions of the Council must be unanimous. According to this, if, say, our immigration policy were brought before the Council, any one of three results might follow: First of all, leaving out the interested parties, there might not be a unanimous decision. In that case the matter would go on in the ordinary course; the Council would investigate and report that the claim that it was a matter of domestic jurisdiction had failed, and would proceed to deal with the dispute in the ordinary course. That is one case. Then there might be a unanimous decision that the particular question raised was not a matter of domestic jurisdiction. If there was a unanimous decision to that effect then the inquiry would go on in the ordinary course, and no protection would arise from the domestic jurisdiction provisions. The third possibility is that there might be a unanimous decision that the question raised was a matter of domestic jurisdiction. That would be the most favourable contingency from the general Australian point of view. Let us consider that for a moment. Suppose a question of our immigration policy arises and Australia claims that it is a matter of domestic jurisdiction, and the Council unanimously decides that it is such a matter, what is the result under the Covenant? Paragraph 8 of Article 15 of the Covenant says that the Council shall so report and shall make no recommendation as to its settlement. That is as to the settlement of the dispute. It may be that the view I am submitting is wrong, but I should like to present it for consideration. It has ordinarily been assumed, and I think the assumption has been adopted in every discussion on the subject that I have read, that if there is a unanimous finding by the Council that a matter is one of domestic jurisdiction war on that subject is impossible, and is prohibited by the Covenant. Let us examine that. The article says that if the Council finds by a proper decision that it is a domestic matter it shall make no recommendation. What follows if it makes no recommendation? Paragraph 6 of Article 15 of the Covenant provides that if the report is unanimously agreed to by the Council then the parties to the Covenant agree that they will not go to war with any party which complies with the recommendation. It is perfectly plain, therefore, that the obligation not to go to war only arises in the case of an inquiry by the Council where it reaches a decision and makes a recommendation. The next clause provides:

‘If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve

to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.'

That is to say, in case the Council fails to reach a unanimous report, the Members of the League are free to fight or not, as they may think fit. That is the real meaning of the words 'reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice'. Under paragraph 8 of Article 15, where the Council finds that a matter is one of domestic jurisdiction and makes no recommendation, it is perfectly plain that there is no recommendation of the Council with which any party can comply. There is no recommendation binding on the parties, and, accordingly, the position is that the parties are free to fight. That is the effect of the words of the Covenant. I hope I have made my point clearly. It is a point which so far as I have seen has not been made before—that on the words of the Covenant if the Council finds that a matter is one of domestic jurisdiction, and it makes no recommendation, that means that it simply drops the matter and leaves the parties free.

MR. COLEMAN.—What about Article 11, providing that there shall be no threat of war?

MR. LATHAM.—The application of Article 11 could not result in a recommendation. I am dealing with Article 15 as it applies to the subject of domestic jurisdiction. I am pointing out what I think would be the result of these provisions, and that, in my view, Australia has not anything like the protection under them which it is ordinarily believed that she has. There may not be a unanimous decision in favour of our contention that a particular matter is one of domestic jurisdiction. The existence of the British veto if Great Britain were to sit, has no bearing on this aspect of the matter. If there is any protection under paragraph 8 of Article 15 it is afforded by a unanimous affirmative finding. It is obvious that the existence of a veto by one Power does not help to bring about a unanimous affirmative finding, so that the British veto has no bearing on the matter, if, indeed, such a veto exists, and I have suggested that it does not exist. The main point I make is that while we might successfully raise the plea of domestic jurisdiction, if there is no recommendation made by the Council, there is nothing to restrict Members of the League from undertaking warlike operations. Under Article 11 any war or threat of war is declared a matter of concern to the whole League, and the League shall take any action which may be deemed wise and effectual to safeguard the peace of the nations. Under that any decision would again have to be unanimous. This is regarded as a conciliatory provision. It is distinct from Article 15 which, by way of a recommendation of the Council, imposes obligations upon the parties. Under Article 11 no obligations are imposed upon the parties according to the ordinary interpretation of the articles. It is directed to conciliating the parties where the Council is not in a position to impose obligations upon them by virtue of Article 15."

In the rest of his speech Mr. Latham took exception to the provisions of Article 10 of the Geneva Protocol on the ground that the attempt to define the aggressor automatically does not succeed because in every instance the definition is dependent upon a preliminary decision of fact. He criticized the Australian

Government for merely rejecting the Protocol. It should, he thought, have followed the example of Canada in offering to accept the compulsory jurisdiction of the Permanent Court with certain reservations.

A. H. CHARTERIS.

GENERAL CONVENTIONS SIGNED AT GENEVA IN 1925

THE General Conventions signed during 1925 dealt with the Smoking of Opium in the Far East; the Manufacture of, and Traffic in, Narcotic Drugs; the Supervision of the International Trade in Arms and Ammunition; Workmen's Compensation for Accidents; Workmen's Compensation for Occupational Diseases; the Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents; and Night Work in Bakeries.

1. CONVENTION CONCERNING THE SUPPRESSION OF OPIUM SMOKING.

On September 27, 1923, the Assembly agreed to a Resolution (No. V of the Fifth Committee) inviting the Council to summon a Conference "with a view to the conclusion of an Agreement as to the measures for giving effective application in the Far East territories to Part II of the Convention (of 1912) and as to a reduction of the amount of raw opium to be imported for the purpose of smoking, &c.

The Conference was duly summoned by the Council and it met in Geneva on November 3, 1924, and adjourned on February 11, 1925. Only countries with possessions or territories where smoking is temporarily permitted were invited to take part, together with the Republic of China, which was included because of the widespread recrudescence of opium production and consumption in its territory, in spite of government prohibition. The following states were accordingly represented: Great Britain, France, Holland, Portugal, Japan, India, Siam, and China.

The Conference adopted an "Agreement", a Protocol, and a Final Act, which were all signed at its last meeting.

Under the Agreement all the parties undertook that the importation, sale, and distribution of opium should be constituted a state monopoly, and that the right to import, sell, or distribute opium should not be leased or delegated to any persons whatever. The Agreement also provided that the making of prepared opium should be made a Government monopoly as soon as circumstances might permit.

It contained an absolute prohibition of the sale of opium to minors, who also are not to be permitted to enter any smoking divan, and it imposed upon the contracting Powers the obligation "by suitable instruction in schools," by dissemination of literature and otherwise, to discourage the use of prepared opium within their territories.

In order to prevent abusive smuggling of excessive amounts of opium into countries where smoking is either forbidden or strictly regulated, the exportation from territories which continue to allow importation for smoking is altogether prohibited. The transit through, or transshipment in, any such territory of *prepared* opium is prohibited, while the transit or transshipment of *raw* opium is only allowed if an Import Certificate issued by the Government of the importing country is produced.

The contracting Powers undertake to assist one another in their efforts to suppress smuggling by the direct exchange of information and views between the heads of the services concerned. They also undertake to examine "in the most favourable spirit" the advisability of legislation to render punishable illegitimate transactions carried out *in another country* by a person residing within their territories. This clause (Article IX) is of some general interest to international lawyers.

The Agreement does not apply to opium destined solely for medical and scientific purposes, and it applies only "to the Far Eastern possessions or territories of the contracting Powers, including leased or protected territories, in which the use of prepared opium is temporarily authorized." It is to come into force 90 days after it is ratified by two Powers and may be denounced at any time, denunciation to take effect one year after notification thereof has reached the Secretary-General of the League.

By the Protocol attached to the Agreement the signatory Powers undertake that they will altogether suppress opium-smoking in their respective territories within a period of not more than fifteen years from the date "when the poppy-growing countries have ensured the effective execution of the necessary measures to prevent the exportation of raw opium from their territories, which constitutes a serious obstacle to the reduction of consumption in the countries where the use of prepared opium is temporarily authorized." A Commission is to be appointed by the Council of the League to decide when "effective execution of the necessary measures" has been carried out.

The Agreement and the Protocol were signed by all the Powers taking part in the Conference, except China.¹

2. CONVENTION FOR NARCOTIC DRUGS.

By another Resolution adopted on September 27, 1923 (No. VI of the Fifth Committee), the Assembly invited the Council to summon a second Conference for the purpose of making another treaty, again supplementary to the Convention of 1912, for the control of the manufacture of, and international trade in dangerous Narcotic Drugs. The Conference was duly summoned; it met at Geneva on November 17, 1924, and adjourned on February 19, 1925. Delegations from forty-one states, including Germany and the United States, took part in its proceedings. The Conference agreed to a Convention, a Protocol, and a Final Act.

The Convention is divided into a number of different chapters.

Chapter I contains the definitions of the Drugs with which the Convention deals: Raw Opium, Medicinal Opium, Morphine, Heroin, Coca Leaf, Crude Cocaine, Cocaine, Ecgonine, and Indian Hemp.

Chapter II contains stipulations for ensuring the effective control within the territory of each signatory state of the production, distribution, and export of raw opium and coca leaves.

Chapter III deals with the internal control of manufactured drugs, and it provides that the manufacture, import, sale, distribution, export, and use of manufactured drugs shall be limited by law to exclusively medical and scientific

¹ The text of the Agreement and the Protocol will be found in League of Nations Document C. 82, M. 41, 1925, XI.

purposes. To this end, all persons engaged in the manufacture, sale, or distribution of such drugs are to be under control. The buildings in which they carry on their industry or trade must be licensed for the purpose, and they themselves must hold a licence or permit to engage in their operations. They must keep full record of all their output, or of their sales or other transactions.

Chapter IV deals with Indian Hemp and forbids its export, except to countries where its import is specifically permitted, and then only provided an Import Certificate is issued by the Government of the importing country.

Chapter V deals with the control of the international trade. It requires a special import licence to be issued for each importation of any drug to which the Convention applies. Similarly no export may take place without a separate export licence granted by the Government of the exporting country, stating the quantity to be exported and the names and addresses of the exporter and importer. The Convention embodies a model "import certificate" which the parties undertake to adopt "so far as possible."

There are further elaborate clauses concerning transit through "third countries," the most interesting of which is that where transit is being effected by air the provisions of the article do not apply "if the aircraft passes over the territory of the third country without landing."

Chapter VI establishes a Permanent Central Board for the control of the international traffic in drugs. This Board, which is to be nominated by the Council of the League, the United States and Germany taking part for the purpose, is to consist of eight members who may not hold any office "which puts them in a position of direct dependence on their Governments." They are appointed for five years and are re-eligible.

To this Board every contracting party agrees to send annually full information, (a) as to its estimated needs of drugs of different kinds "for internal consumption during the following year for medical, scientific, and other purposes"; (b) as to its production of raw opium, &c., its output of manufactured drugs, its stocks, its actual consumption in the current year for internal purposes, its confiscations of illicit exports or imports, &c., &c.

With this information at its disposal, the Central Board is "continuously to watch" the course of the international trade, and if it believes that any country is accumulating excessive quantities of any drug, it may recommend to the other parties that no further exports should be sent to that country until satisfactory explanations have been made. For this purpose the Board may act by "absolute majority of the whole number of the Board."

An important clause (Article XXV) gives the friendly right to any contracting party to draw the attention of the Board to any matter which appears to require investigation in any respect (cf. Article 11 of the Covenant). The Board, which will be an important autonomous international entity, is given wide powers of various kinds, including the right to publish its own reports if it desires to do so.

Chapter VII contains the general provisions of the Convention, the most important of which relates to the settlement of disputes. For the friendly settlement of differences which arise a special technical body is to be set up by the Council, which shall give advisory opinions concerning the merits of disputes before they are submitted either to arbitration or judicial settlement. If, however, a dispute is not settled in this way, and if no other agreement for its

settlement is made, any party may refer it, as of right, to the Permanent Court of International Justice (Article XXXII).

The Convention comes into force when it has been ratified by ten Powers "including seven of the states by which the Central Board is to be appointed . . . of which two at least must be permanent members of the Council of the League."

The Protocol attached to the Convention contains a recognition by the parties that a duty rests upon them to establish "such a control over the production, distribution, and exportation of raw opium as would prevent illicit traffic" and the parties accordingly agree to take within five years the necessary measures to this end.

The Convention was signed on the last day of the Conference by fourteen states, and the Protocol by eleven states.¹

3. THE ARMS TRAFFIC CONVENTION.

On September 27, 1924, the Fifth Assembly adopted a Resolution (No. 2 of the Third Committee) requesting the Council to invite all states, Members and non-Members of the League, to take part in an international conference to draw up a convention on the Arms Traffic, and proposing that the conference should found its work on a draft convention on the subject prepared by the so-called "Temporary Mixed Commission."

The conference was duly summoned; it met at Geneva on May 4, 1925, and adjourned on June 17, 1925, having drawn up a Convention, a Declaration regarding the Territory of Ifni, a Protocol on Chemical and Bacteriological Warfare, a Protocol of Signature, and a Final Act. Forty-four states sent delegations to take part in its work, including the United States of America, Germany and Egypt, while the Argentine Republic sent observers.

The important part of its work is embodied in the Convention which replaces the abortive Convention signed at St. Germain in 1919. Its full title is the "Convention for the Supervision of the International Trade in Arms, Ammunition and in Implements of War," and it is divided into five chapters with two Annexes, the Annexes including Statistical Forms, detailed categories of Arms, and elaborate and precise rules concerning supervision in the so-called "Special Zones."

Chapter I divides arms, ammunition, and implements into five separate categories:

- (i) Arms . . . exclusively designed and intended for land, sea, or aerial warfare;
- (ii) Arms . . . capable of use both for military and other purposes;
- (iii) Vessels of war and their armament;
- (iv) Aircraft;
- (v) Other arms, including ammunition, gunpowder, and explosives.

Chapter II contains detailed rules for "Supervision and Publicity" of the international trade in arms of all these five categories. For the first, and of course most important category, it lays down that in principle they may only be exported to a foreign Government or to a public authority which acts on

¹ The text of the Convention and the Protocol can be found in League of Nations Document C. 88, M. 44, 1925, XI.

behalf of a foreign Government and with its express consent. Before permission to export is given, an order in writing furnished by the Government of the importing country must have been provided. Only in certain narrowly restricted cases is export to private individuals allowed, as an exception to this general rule that arms may be sold only to Governments. Before export takes place, a separate export licence for each consignment of arms must be obtained from the Government of the exporting country, and each consignment must be accompanied by a document showing the names and addresses of the exporter and of the "importing consignee," a detailed description of the arms, and the name of the Government which has authorized to import (Articles 2-4).

Similarly for the second category of arms, export may only take place after a licence or endorsement has been secured from the Government of the exporting country. If the law of the importing country requires the permission of its Government for the import of arms, the export licence shall only be granted when this permission has been obtained. If, however, on account of "the size, destination or other circumstances" of a consignment, any contracting party considers that it is "intended for war purposes," then it is obliged to apply the full provisions of Articles 2-4. This is an important application of the general principles relating to the first category of arms.

The effect of these provisions upon the sale of arms to the various Military Governors in China, which at present goes on without restriction, is a matter of much interest. Presumably it is from the Government of Peking that authority to import would have to be obtained, and consignments which did not obtain that authority would not be allowed.

In order to supplement this system of "supervision" by a full system of "publicity", the parties undertake to publish four times a year, "within two months of the close of each quarter," a full statistical return of all their foreign trade in arms of the first two categories, showing the weight or number and value of the articles exported or imported, and their country of origin and destination. Thus the world at large will be furnished with full information of all kinds concerning the traffic in arms (Article 6).

For the third category—warships and their armament—the parties undertake to publish a similar quarterly return showing full details concerning all vessels of war "constructed, in course of construction or to be constructed" within their territorial jurisdiction on behalf of the Government of another state. It is to be noted that this provision is the same in principle as that of Article 16 of the Washington Naval Convention.

Likewise a similar quarterly return must be published showing the export of aircraft and aircraft engines, but except for this, and subject to the rules in Chapter III about "special zones", articles covered by the fourth and fifth categories may be exported "without formalities or restrictions."

Under another especially important clause the parties undertake to apply the above system of authorization and publicity to their trade with *non-signatory* states as well as to their trade with other signatories (Article 11).

If the Convention is ratified by a considerable proportion of its signatories, therefore, the whole international trade in arms should come directly or indirectly under its system of publicity and supervision.

Chapter III lays down rules about the so-called "special zones", the import of arms into which is subject to additional and severe restrictions. Three zones

are defined by Article 12, two of them on land (the first including the greater part of Africa ; the second including the Arabian peninsula, Gwadar, Syria and Lebanon, Palestine and Transjordan, and Iraq) the third zone being maritime and including the Red Sea, the Gulf of Aden, the Persian Gulf, and the Gulf of Oman.

For all arms exported to these zones the system of licensing above described is to apply in full, and a special separate quarterly return of exports is to be published. For supervision over their import into the zones special officials are to be appointed by the local Governments, and there are detailed rules concerning arms in transit across any territory in a "special zone", concerning their transport in native vessels, concerning the flag which native vessels shall be allowed to fly, and flag authorizations granted to owners of such vessels, &c. The parties undertake to apply these rules, together with those of Annex II which supplement them, and which deal with the rights of warships, disputes concerning seizure of arms, &c., in all their territories, protectorates, or mandated areas within the special zones, and to appoint the necessary officers to ensure their execution and observance.

Under Chapter IV certain special provisions concerning Abyssinia and the states bordering on Russia are laid down, and in Chapter V there are various "General Provisions" of importance. The convention is not to apply to arms sent by a party to its own state forces abroad ; Chapter I is suspended in time of war, so far as concerns arms sent to a belligerent ; previous conventions on the subject are abrogated ; disputes concerning "the interpretation or application" of the convention are, if they arise between signatories to the Statute of the Permanent Court of International Justice, to go as of right to the Court on the demand of any party ; if between non-signatories to the Statute they are to be submitted to the Court or to a special tribunal of arbitration, as may be agreed. There are complicated provisions about ratification and denunciation ; after three years from its coming into force the convention shall be subject to revision upon the demand of one-third of the signatories ; it comes into force four months after it has been ratified by *fourteen* Powers.

The Protocol concerning Chemical and Bacteriological Warfare contained a simple declaration by the signatories to the effect that in so far as they were not already bound by treaties not to use poisonous gases, they agreed for the future not to do so, and to extend the prohibition also to "bacteriological methods of warfare." This declaration they made "to the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations."

Up to September 1, 1925, twenty-two states had signed the Arms Traffic Convention, including the United States of America, Austria, British Empire, Czechoslovakia, France, Germany, Italy, Japan, and Poland—that is to say, all the large arms-producing countries except Russia. Up to the same date thirty countries had signed the Protocol on Chemical and Bacteriological Warfare.¹

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The General Conference of the International Labour Organization held its seventh session in Geneva from May 19 to June 10, 1925. During its pro-

¹ The text of the Convention, Protocol, &c., can be found in League of Nations Document A. 16, 1925, IX, C.C.I.A., M. 91 (3).

ceedings it adopted four Draft Conventions and four Recommendations. The Draft Conventions, having each received a favourable vote of more than two-thirds of the Conference, required no formal signature by the Members of the Organization but were adopted definitely "for ratification . . . in accordance with the provisions of Part XIII of the Treaty of Versailles." The Recommendations were all supplementary to the Draft Conventions and dealt with the same subjects.

4. DRAFT CONVENTION CONCERNING WORKMEN'S COMPENSATION FOR ACCIDENTS.

Each Member of the Organization which ratifies this convention undertakes to ensure compensation to any worker who is injured by industrial accident, or to his dependants if he is killed. This undertaking applies to *all* workers except casual workers, outworkers, members of the employer's family, highly paid non-manual workers, agricultural workers (who are already dealt with by a convention made at the Third Conference), and seamen and fishermen (for whom a special convention is to be made at a later session).

The convention provides that compensation shall be made by periodical payments of money, and by the provision of medical aid and artificial limbs, &c., at the expense of the employer or insuring agency or society, and that its continued payment shall be safeguarded by state action if the employer or insuring agency should go bankrupt. It comes into force when ratified by any two Members; the necessary legislation is to be passed not later than January 1, 1927, and it shall be subject to revision on the initiative of the Governing Body of the Organization "at least once in ten years." These general provisions are the same in all the four conventions adopted by the Conference.

The convention itself contains nothing about the *amount* of compensation to be paid, but an attached recommendation suggests that each Member "should take . . . into consideration" the principles that for total disablement or death a worker or his dependants should receive two-thirds of his annual earnings; that for partial disablement he should receive a proportion of his earnings "calculated in reference to the reduction of earning power caused by the injury" and that vocational re-education should be provided for all injured workmen.

5. DRAFT CONVENTION CONCERNING WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES.

This convention applies to workers suffering from occupational diseases identically the same principles as those applied by the convention last described to workers injured by industrial accident. It provides that the compensation given to such workers shall not be "less than that prescribed by the national legislation for injury resulting from industrial accidents." It applies to workers in a prescribed list of industries and processes in which poisonous substances are used, the prescribed poisonous substances being lead and its alloys and compounds, mercury and its amalgams and compounds, and anthrax infection. The convention may be denounced after five years from its entry into force, denunciation to take effect after a further year's delay.

6. DRAFT CONVENTION CONCERNING EQUALITY OF TREATMENT FOR NATIONAL
AND FOREIGN WORKERS AS REGARDS WORKMEN'S
COMPENSATION FOR ACCIDENTS.

By this convention each Member of the Organization which ratifies it undertakes to grant to the nationals of any other ratifying Member, if they suffer injury by industrial accident happening in its territory, "the same treatment in respect of workmen's compensation as it grants to its own nationals." This equality of treatment is to be granted to foreign workers and their dependants without any condition as to residence, but for certain classes of cases exceptional bi-lateral agreements may be made by the Governments concerned.

Members which do not possess a system of workmen's compensation agree to institute such a system within three years of their ratification, and they agree to assist other ratifying states in executing the convention by an exchange of information concerning modifications of the laws in force in their respective countries.

The convention may be denounced after ten years from its entry into force, denunciation to take effect after a further year's delay.

7. DRAFT CONVENTION CONCERNING NIGHT WORK IN BAKERIES.

Subject to certain exceptions, this convention prohibits the making of "bread, pastry or other flour confectionery" during the night. It does not apply to the wholesale manufacture of "biscuits", which each signatory is free to define for itself, after consultation with employers and workers. The term "night" signifies a continuous period of seven hours, which must in principle include the period from 11 p.m. to 5 a.m.

The exceptions allowed are in respect of necessary "preparatory or complementary work," the necessities of baking in tropical countries, arrangements necessary for the weekly rest, temporary circumstances due to "unusual pressure of work," and accidents, actual or threatened. In no case may persons under eighteen be employed in bakeries during the night.

The provisions concerning denunciation are the same as those contained in Convention No. 6.¹

P. J. N. B.

¹ The text of the last four conventions and of the accompanying recommendations is to be found in a special unnumbered document issued by the International Labour Office on July 10, 1925.

DECISIONS, OPINIONS AND AWARDS OF INTERNATIONAL TRIBUNALS, 1925-6

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE ¹

JUDGMENT No. 6. DELIVERED AUGUST 25, 1925.

*Case concerning certain German interests in Polish Upper Silesia
(Question of Jurisdiction).*

THIS case was brought before the Permanent Court of International Justice by means of an Application filed by the German Government on May 15, 1925, in which complaint was made of certain measures taken by the Polish Government in regard to (1) a nitrate factory at Chorzow and (2) a number of large agricultural estates in other parts of Polish Upper Silesia. The intervention of the Court thus unilaterally invoked was grounded upon the Convention between Poland and Germany signed at Geneva on May 15, 1922, which in Articles 6 to 23 defines the conditions under which Poland is entitled to expropriate the property of German nationals in the parts of Upper Silesia transferred to her. Article 23 contained the following provision :

“ 1. Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice.”

Briefly the material facts were these :

(1) In 1915 a contract had been concluded between the German Government and a German company, the Bayerische Stickstoffwerke A.-G., whereby the company undertook to establish and run a nitrate factory at Chorzow in Upper Silesia, the necessary lands to be acquired on behalf of the Reich and entered in the Reich's name in the land register. Certain rights of supervision as well as a share of the profits were reserved to the Reich. In December, 1919, a new company, the Oberschlesischer Stickstoffwerke A.-G., was formed to which the Reich sold the land. The management and working of the factory remained in the hands of the Bayerische Company, but the Oberschlesischer Company was, on January 29, 1920, duly entered in the Chorzow land register as owner of the landed property. On July 14, 1920, a law was enacted in Poland which provided, in effect, for the annulment of all real rights in Polish territory acquired by the Reich after November 11, 1918 (the date of the Armistice), notwithstanding their subsequent alienation, and the substitution in the enjoyment of those rights of the Treasury of the Polish State. This law purported to be based upon Article 256 of the

¹ The judgments and advisory opinions of the Court and the acts and documents relating thereto are published by the Court in three separate series, containing respectively *Judgments* (Series A), *Advisory Opinions* (Series B) and *Acts and Documents relating to Judgments and Advisory Opinions* (Series C). The publisher is A. W. Sijthoff's Publishing Co., Leyden (English Agents : Butterworth & Co., Bell Yard, Temple Bar, W.C. 2).

Treaty of Versailles. On July 1, 1922, the part of Upper Silesia now in question having been transferred to Poland, the competent tribunal of the Chorzow district gave a decision, cancelling the registration of the Oberschlesischer Company as owner of the land and ordering that the Polish Treasury should be registered in its place. Further, on July 3, 1922, the Polish Government, in pursuance of a Decree of June 24, 1922, took possession of the factory and its management, including movable property, licences, &c.

On November 10, 1922, the Oberschlesischer Company brought an action before the Germano-Polish Mixed Arbitral Tribunal in Paris claiming restoration of the factory and compensation. Poland in reply challenged the jurisdiction of the Tribunal, but the suit was admitted and was still pending at the date of the Judgment of the Permanent Court of International Justice. The company also commenced proceedings in the Civil Court of Kattowitz which were still in a preliminary stage.

(2) With respect to the agricultural estates the matter complained of was the issue by the Polish Government on December 30, 1924, of a notification, pursuant to Article 15 of the above-mentioned Convention, of their intention to expropriate certain large estates in Upper Silesia belonging to twelve proprietors, namely :

Count N. Ballestrem.

The Georg Giesches Erben Company.

Prince zu Hohenlohe-Oehringen.

The Vereinigte Königs und Laurahütte Company.

Baroness M. A. von Goldschmidt-Rothschild.

Prince von Lichnówsky.

The City of Ratibor.

Frau Gabriele von Ruffer.

The Godulla Company.

Frau Hedwig Voigt. (The notice in this case was subsequently withdrawn and therefore no further question arose as to it in these proceedings.)

Six of the above-mentioned proprietors brought actions before the Germano-Polish Mixed Arbitral Tribunal under Article 19 of the Geneva Convention, none of which had come to trial at the date of the present judgment.

In the German Application instituting proceedings before the International Court it was submitted :

(1) that the attitude of the Polish Government in regard to the two companies mentioned above was not in conformity with Article 6 and the following Articles of the Geneva Convention, and (2) that the liquidation of the estates referred to above would not be in conformity with the same provisions. The Application also contained a submission, relating to the factory at Chorzow, that certain provisions of the Polish Law of July 14, 1920, constituted measures of liquidation and were contrary to Articles 92 and 297 of the Treaty of Versailles.

In answer to the Application the Polish Government took a preliminary objection that the Court had no jurisdiction to entertain the suit in either of its branches, or, in the alternative, that the Application could not be entertained pending the decision of the Mixed Arbitral Tribunal in the proceedings referred to above.

Inasmuch as the ordinary members of the Court do not include a national of either party, a Polish and a German National Judge were selected to sit on

the Bench in accordance with Article 31 of the Statute, and the Court of 13 judges met in July, 1925, to hear oral arguments.

The Polish Government contended, in the first place, that there was no jurisdiction because the existence of a "difference of opinion" in regard to the construction and application of the Geneva Convention had not been established before the filing of the Application. In regard to this point, the Judgment of the Court observes that, unlike most compromissory clauses, Article 23 of the Convention does not make diplomatic negotiations a condition precedent to the submission to judicial settlement. "A difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views. Even if under Article 23 the existence of a definite dispute were necessary, this condition would at any time be fulfilled by means of a unilateral action on the part of the applicant Party, and the Court cannot be allowed to be hampered by a mere defect of form the removal of which depends solely on the Party concerned."

Secondly, the Polish Government contended in regard to the factory at Chorzow that the difference of opinion did not relate to Articles 6 to 22 of the Convention, as required by Article 23, but solely to the interpretation of the Polish law of 1920. Germany maintained that this law was a measure of liquidation; Poland that its effect was simply to annul acts contrary to Article 256 of the Treaty of Versailles and the Armistice Protocol of Spa. The Court held that the decision of the question of jurisdiction could not be made to depend simply upon the form of the opposing submissions. Without in any sense pre-judging the merits, the Court must ascertain whether or not the decision of the case on the merits depends upon the provisions mentioned in Article 23. Article 6 (being one of those provisions) provides that Poland may *expropriate* in Polish Upper Silesia, in conformity with Articles 7 to 23, undertakings belonging to the category of major industries but that otherwise the property rights and interests of German nationals or companies controlled by them may not be *liquidated* in that territory. The difference of opinion between the parties relates to the question whether in the case of dispossession under consideration these provisions are or are not applicable—in other words to the extent of the sphere of application of Articles 6 to 22. Whatever may be the scope of the conceptions of "liquidation" and "expropriation" in Article 6 it is clear that it is intended to define Poland's powers in regard to dispossession. It follows that the differences of opinion contemplated in Article 23, which refers to Article 6, may also include differences of opinion as to the extent of the sphere of application of Article 6 and consequently the difference between the parties in the present case.

Poland, further argued that Article 6 was not applicable because the property in question did not belong to German nationals but to the Polish State, as successor to the German Reich under Article 256 of the Treaty of Versailles. As to this point, the Court found that, according to the documents laid before it, the factory undertaking had never belonged in its entirety to the Reich and this was not even suggested by the Polish Government. It was clear that the undertaking had property, rights and interests, the private character of which was indisputable, distinct from the lands and buildings. Under Article 6 of the Convention the factory at Chorzow must be regarded as a whole and whatever may be the effect of Article 256 of the Treaty of Versailles as regards real

property which had belonged to the Reich, the undertaking as such, in the opinion of the Court, falls under the terms of Article 6 of the Geneva Convention. Again, in so far as the Bayerische Company is concerned, the Court observes that it is established that this is a German company, the private character of which is not disputed. The taking over of the factory by Poland put an end to this Company's contractual rights with the Oberschlesischer Company and consequently affected rights and interests possessed by German nationals in Upper Silesia. Moreover, the real property, ownership of which Poland claims, was, at the time when the Convention came into operation, entered in the land register as the property of a German company, which as such falls within the scope of Article 6.

The Court recognizes that the question of the application of the Geneva Convention will involve giving an interpretation of Article 256 of the Treaty of Versailles, but merely as a preliminary or incidental point. "The interpretation of other international agreements is indisputably within the competence of the Court if such interpretations must be regarded as incidental to a decision on a point in regard to which it has jurisdiction."

With respect to the other branch of the case, viz. the agricultural estates, the matter was *prima facie* within the jurisdiction inasmuch as the notice of intention to expropriate was in terms based upon Article 15 of the Convention. Germany contended that the estates in question did not come within the clauses defining the estates liable to expropriation (Articles 9, 12, 13, and 17 of the Convention). The point relied upon by Poland to oust the jurisdiction of the Court was that she had neither expropriated nor decided to expropriate, but only given notice of intention to proceed to expropriation. The Court held that its jurisdiction was clear. There was, at any rate, a difference of opinion between the two parties on the question whether the provisions governing the right of expropriation were or were not applicable from the moment when notice of intention was given; in other words, whether Poland was, according to the terms of the Convention, entitled to give notice in the case of estates not ultimately liable to expropriation. This was a "difference of opinion respecting the construction and application of Articles 6 to 22" within the meaning of Article 23.

As has been mentioned, the Polish objection was based alternatively upon the fact that certain proceedings had been commenced or were pending before the Mixed Arbitral Tribunal. This plea was rejected by the Court. After observing that it was a much disputed question whether the doctrine of "litispendance" applied in international relations, the Court pointed out that the essential elements of this conception were lacking in the present case. There was no question of identical actions. The parties were different—in the one case the applicant was a private person or corporation, in the other the German Government—and the Courts were not of the same character. This conclusion applied *a fortiori* to the action pending in the Polish tribunal of Kattowitz.

In the result the Court reserved both parts of the case for judgment on the merits.

Count Rostworowski, Polish National Judge, delivered a dissenting opinion. Judge Anzilotti, whilst agreeing with the conclusions of the Court, added certain observations in regard to one point in the statement of reasons. In these observations he expressed disagreement with the view that it was sufficient,

in order to found jurisdiction, to establish that the difference of opinion between Germany and Poland relates to the question whether Articles 6 to 22 of the Geneva Convention are or are not applicable in the case of the factory at Chorzow. Relying upon the judgment in the *Mavrommatis Palestine Concessions* (Judgment No. 2) he holds that the Court must first satisfy itself that the Articles are applicable.

It is respectfully submitted that the present case is distinguishable from the *Mavrommatis* case, inasmuch as it was there necessary in order to link up the claim at all with the Mandate (the interpretation and application of which were the source of the Court's jurisdiction) to establish that the Mandatory had, in exercise of its powers under Article 11 of the Mandate, granted a concession to a *third party* capable of violating its international obligations towards M. Mavrommatis. There was nothing whatever on the face of the mandate directly relating to rights of the character claimed by Mavrommatis. In that case, therefore, it was a condition precedent to the exercise of the Court's jurisdiction that it should satisfy itself that such a concession had as a matter of fact been granted.

In the present case, on the other hand, the Geneva Convention related directly to dispossession of German property by Poland and the only dispute was whether or not the acts complained of came within its scope.

The test applied by the Court appears to be this: Does the case on the merits raise a genuine question of interpretation and application of provisions in regard to which the Court has been given jurisdiction, upon the answer to which the decision will depend? The Court will go into the facts to the extent necessary to answer this test question, even on the hearing of a preliminary objection, as otherwise the mere assertion of jurisdiction by the one side and denial by the other would create an *impasse*.

The difficulty of segregating the preliminary question from the merits is illustrated by the present case, as it is in the already not inconsiderable number of other judgments and opinions touching the jurisdiction of the Court or the League of Nations.

ADVISORY OPINION NO. 11. DELIVERED MAY 16, 1925.
POLISH POSTAL SERVICE IN DANZIG.

On March 13, 1925, the Council of the League adopted a Resolution asking the opinion of the Court upon questions in dispute between Poland and the Free City of Danzig in regard to the Polish Postal Service there. The dispute was a complicated one of long standing, which had been brought to an acute stage by the setting up in the streets of the City in January, 1925, of letter-boxes bearing Polish inscriptions.

The resolution of the Council after setting out the facts propounds the following questions: (1) Is there in force a decision of General Hacking, the former High Commissioner of Danzig, which decides the points at issue regarding the Polish postal service, and if so does such decision prevent reconsideration by the High Commissioner or the Council of all or any of these points? (2) If the questions set out at (a) and (b) below have not been finally decided by Gen. Hacking: (a) Is the Polish postal service at the Port of Danzig restricted to operations which can be performed entirely within its premises in the Heveliusplatz, or is it entitled to set up letter-boxes and collect and deliver

postal matter outside these premises ? (b) Is the use of the said service confined to Polish authorities and officials, or can it be used by the public ?

The Court, at the request of the League, considered this case at an extraordinary session, and it may be noted that in contrast to other advisory cases no oral argument took place, the interested parties being content to file various memoranda and documents.

Following the principles laid down in Opinions Nos. 8 and 9, the Court expressed the view that the decisions of the High Commissioner given in pursuance of international agreements are binding upon the parties and final where the provisions for appeal to the League have not been made use of, but after careful examination of these decisions came to the conclusion that they do not cover the points at issue. The functions of the High Commissioner in this connexion are of a judicial character and are limited to deciding the actual questions submitted to him—it is only in so far as the decision of such questions is concerned that decisions have binding force. Moreover, reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the parties. It is interesting to observe that upon this point the Court cited with approval an award of the Permanent Court of Arbitration, which, however, it distinguished from the present case.

In regard to a contention of Danzig relying upon a letter which, it was said, showed the real intention of the High Commissioner, the Court said that once a decision has been duly given, it is only its contents that are authoritative, whatever may be the views of its author. In the result, the Court held upon question (1) that there was no decision in force deciding the points at issue.

As to question (2) the Court found that there was no trace of any provision confining the operation of the Polish postal authorities to the inside of its postal buildings. The postal service which Poland is entitled, under the Treaty of Versailles and supplemental agreements, to establish in the Port of Danzig must be interpreted in its ordinary sense so as to include the normal functions of a postal service as regards collection and distribution outside the post office. Indeed, any limitations in this respect would be of so exceptional a character that they cannot, in the absence of express reservations, be read into the text of treaty stipulations. Similarly as to "Polish authorities and officials," there is no ground for restricting the service to these classes to the exclusion of the public.

Danzig urged that Poland's postal rights in the Free City constitute a grant in derogation of the postal monopoly of Danzig and must be strictly construed in favour of Danzig. Upon this point, which in one form or another has been repeatedly raised before the Court, it laid down the proposition that the rules as to strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. "It is a cardinal principle of interpretation that words must be interpreted in the sense they would normally have in their context unless such interpretation would lead to something unreasonable or absurd." Question (2) was accordingly answered in the sense contended for by the Polish Government, but it is to be noticed that the Court expressly pointed out that it was no part of its task to define or delimit the port of Danzig, a matter upon which the practical application of its answers largely depended.

The opinion was unanimous.

ADVISORY OPINION NO. 12. DELIVERED NOVEMBER 21, 1925.

FRONTIER BETWEEN TURKEY AND IRAQ.

By resolution dated September 19, 1925, the Council of the League referred the following questions to the Court for its advisory opinion: "1. What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne—is it an arbitral award, a recommendation or a simple mediation?

"2. Must the decision be unanimous or may it be taken by a majority?

"May the representatives of the interested Parties take part in the vote?"

As is well known, the question of Mosul (as it is generally called) had been before the League for a considerable time. A Commission had been appointed to proceed to the spot and had presented its report containing recommendations as to the allocation of the disputed territory, and the Council had embarked upon the task of fixing the frontier, when questions were raised as to its precise functions and powers, with the result that the above questions of law were submitted to the Court. An extraordinary session was convoked in October, 1925, and oral arguments were heard on behalf of the British Government. The Turkish Government declined to send a representative but addressed to the Court a telegram in which certain contentions were put forward.

The Court, in its unanimous Opinion, points out that question 1 is a matter of interpretation of Article 3, paragraph 2, which runs as follows: "From the Mediterranean to the frontier of Persia, the frontier of Turkey is laid down (*fixée*) as follows:

(1) With Syria:

The frontier described in Article 8 of the Franco-Turkish Agreement of October 20, 1921.

(2) With Iraq:

The frontier between Turkey and Iraq shall be laid down (*déterminée*) in friendly arrangement to be concluded between Turkey and Great Britain within nine months.

In the event of no agreement being reached between the two Governments within the time mentioned the dispute shall be referred to the Council of the League of Nations.

The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision."

The Court after stating that its mission is to interpret this provision and in the first place to ascertain from its wording what the intention of the parties was, comes to the conclusion, after careful consideration, that the intention was by means of recourse to the Council to ensure a definite and binding solution of the dispute—in other words, the final determination of the frontier. This interpretation is supported by the use of the terms *fixée*, *déterminée* in the authentic text, by the very nature of a frontier and of any convention designed to establish frontiers between two countries—which import the constitution of a definite boundary line—and, finally, by the use of the word "decision" in the third sub-paragraph of Article 3 (2).

Moreover, confirmation of this view is afforded by Article 16 of the Treaty

which provides that "Turkey renounces all rights and titles whatsoever over or respecting the territories situated outside the frontiers laid down (*prévues*) in the present Treaty." The expression *prévues* clearly includes both frontiers already defined and frontiers which have yet to be determined by the method laid down in Article 3 (2).

It is to be observed that the British representative strenuously contended before the Court that the true meaning of the Article was, as a matter of law, to be gathered from its actual terms alone, and that consideration of the negotiations previous to the signature of the Treaty was inadmissible. This contention was in effect upheld by the Court in the following passage: "Since the Court is of opinion that Article 3 is in itself sufficiently clear to enable the nature of the 'decision to be reached' by the Council under the terms of that Article to be determined, the question does not arise whether consideration of the work done in preparation of the Treaty would also lead to the conclusions set out above." Nevertheless as special reliance was placed by the Turkish Government on certain remarks made by Lord Curzon at Lausanne the meaning of which was, according to the Turkish view, that the consent of the parties was necessary to any solution adopted by the Council, the Court dealt also with this point. The Court observes that the remarks in question were made before any draft of Article 3 existed, and the proposal of which they formed part was rejected by Turkey. By the subsequent adoption of Article 3 the legal position was fundamentally modified and it is not therefore possible to interpret this Article by reference to statements relating to the situation previously existing.

Whilst, as mentioned above, the Court held that the rôle of the Council was finally to settle the frontier, the Opinion proceeds to examine what is the nature of the Council's decision, and holds that it is not an arbitral award in the strict and limited sense whereby arbitration is the settlement of differences between States by *judges* of their own choice and *on the basis of respect for law* (Hague Convention of 1907). The settlement of the present frontier dispute does not primarily depend on legal considerations and "moreover it is impossible properly speaking, to regard the Council, acting in its capacity of an organ of the League of Nations, as a tribunal of arbitrators. . . . The Covenant . . . refers in Article 13 to the more limited conception of arbitration; and the Council, whose first duty is to dissipate or settle political disputes, is never considered in the Covenant as exercising the functions of arbitrator within the meaning of that article. Nevertheless the Court holds that this fact does not prevent the Council from being called upon, by the mutual consent of the parties, to give a definitive and binding decision in a particular dispute." This is what has been done in Article 3 (2) of the Treaty of Lausanne.

In regard to question 2 the Court starts by pointing out that Article 3 (2) refers to "the Council of the League of Nations," i. e. the Council, with the organization and functions conferred upon it by the Covenant. The Covenant by Article 5 lays down the rule of unanimity, which is, indeed, rendered necessary by the character of the Council. This principle only admits of exceptions if they are expressly provided for. The Council can undoubtedly undertake to give decisions by a majority in specific cases if express provision is made for this by treaty, but Article 3 (2) of the treaty of Lausanne does not do so.

Article 5 of the Covenant does not, however, contemplate the case of an

actual dispute which has been referred to the Council. This contingency is dealt with by Article 15, paragraphs 6 and 7, of the Covenant "which, whilst making the limited binding effect of recommendations dependent on unanimity explicitly state that the Council's unanimous report need only be agreed to by the Members thereof other than the representatives of the parties. . . . It follows that according to the Covenant itself in the case of the settlement of a dispute the rule of unanimity is applicable subject to the limitation that the votes cast by representatives of the interested parties do not affect the required unanimity. The Court is of opinion that it is this conception of the rule of unanimity which must be applied in the dispute before the Council. . . . If such unanimity is necessary in order to endow a recommendation with the limited effects contemplated in paragraph 6 of Article 15 it must *a fortiori* be so when a binding decision has to be taken."

The representatives of the parties are, accordingly, entitled to take part in the deliberations of the Council and in the voting, but their votes do not count for the purpose of determining whether unanimous agreement has been reached.

ALEXANDER P. FACHIRI.

PECUNIARY CLAIMS ARBITRATION BETWEEN GREAT BRITAIN AND THE UNITED STATES

ZAFIRO CLAIM

D. EARNSHAW, A. YOUNG, G. GILCHRIST.

Claim No. 39.

Looting by members of the crew of a naval collier—Defective control of crew by ship's officers—Responsibility of the Government.

THE claimants were British employees of a foreign company, called the Manila Slipway Company at Cavite in the Philippine Islands. On May 1, 1898, during the Spanish-American war, hostilities were in progress at Cavite and the claimants vacated the houses which they occupied on the company's premises and withdrew with their families to a place of safety. While their houses were empty the *Zafiro* was ordered to Cavite to coal, and moored alongside the company's wharf in close proximity to the houses of the claimants. Before the claimants returned to their houses, the houses were looted and much property destroyed, a substantial part of the damage being done by Chinese members of the crew of the *Zafiro*, who had been given leave to go on shore. No arrangements were made to keep control over the members of the crew while they were on shore.

The *Zafiro* had been a British merchant vessel and was bought by the United States for use as a collier and supply ship during the war. She was not commissioned as a warship, but was registered as an American vessel, the officers and crew were taken into the American service, and an ensign and four men were placed on board in order to exercise control.

The British Government claimed compensation from the United States Government for the damage done to the property of the claimants. Liability was denied and the claim was referred to arbitration under the provisions of the Pecuniary Claims Agreement of 1910. The case was heard at Washington

on November 19, 1925, and on November 30 the Tribunal gave the following decision :

AWARD

PHILIPPINE WAR CLAIMS (*Zafiro Case*).

D. EARNSHAW, A. YOUNG, G. GILCHRIST.

Arbitrators : ALFRED NERINX, SIR CHARLES FITZPATRICK, ROSCOE POUND.

British Memorial, filed January 1, 1914.

United States Answer, filed June 20, 1924.

Hearing of the case, November 19, 1925.

Counsel :

United States. MARSHALL MORGAN.

Great Britain. MONTAGUE SHEARMAN.

These are claims for property looted or destroyed by the crew of the *Zafiro*, on May 4, 1898, while the ship was moored alongside the wharf of the Manila Slipway Company at Cavite, engaged in coaling. The claimants were employees of the company and lived on the premises in houses belonging to the company. During the naval battle of May 1, 1898, in Manila Bay, as the wharf and premises were in the line of fire and shells were exploding about the houses, the claimants and their families went away for safety, leaving the premises in charge of Filipino watchmen and Chinese employees of the company. On May 4 the *Zafiro* was ordered to go to the Spanish coal pile at Cavite to coal, and in order to do so moored alongside the company's wharf. The evidence as to what followed is in conflict and there is much dispute as to the facts. We do not doubt that the affidavits of the watchmen and of the Chinese employees are at least somewhat exaggerated. But it is clear enough that the Chinese crew of the *Zafiro* took a substantial part in the looting of the houses of the claimants and destruction of their property, which was undoubtedly complete and thorough. Hence it becomes necessary to consider whether and how far the United States is liable for the actions of the crew.

It appears that the *Nanshan* and *Zafiro*, two British merchant vessels, were bought by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. They were not commissioned, but were registered as American vessels, and the original crews (British officers and Chinese sailors) were shipped in the American merchant service. The reason for so doing is set forth in Admiral Dewey's Autobiography as follows : " We registered them as American merchant steamers, and by clearing them for Guam, then almost a mythical country, we had a free hand in sending them to English, Japanese, or Chinese ports to get any supplies we might need." In other words it was not intended that they should trade and they did not trade. They were used as supply ships and colliers ; and the purpose of registering them as merchant steamers was to enable them to resort to neutral ports to obtain supplies and coal, not for general purposes of the United States, but for the specific purposes of Admiral Dewey's naval operations. An ensign and four men were placed on each, and Admiral Dewey and Admiral Crowninshield each speak of the naval officers as being " in command." Admiral Crowninshield says : " The

naval officer exercised control over all the movements of the ship and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew and with the ship." Ensign Pearson, now Commander Pearson, who was on the *Zafiro*, says: "My instructions were not to interfere particularly with the details of the ship's routine, but to receive the Admiral's orders for the ship and see them carried out, and to assist as much as possible and consistent with the general duty of the ship." He adds: "At the time of her purchase she was manned by British merchant officers and a crew of Chinese. With the exception of the captain and chief engineer, these officers and crew were retained on the vessel. . . . A. M. Whitton, who had been first mate, was made captain, and W. D. Prideauz, formerly second mate, was made first mate. . . . The handling and management of the Chinese crew was left to the ship's officers, who had been with the crew in the merchant service and better understood their ways and peculiarities."

On behalf of the United States it is contended that the *Zafiro*, registered as a merchant ship, must be so regarded and cannot be held to be a public ship for whose conduct the United States may be held liable. In support of that contention reference is made to a long line of cases as to the immunities of public ships, e. g. *The Exchange*, 7 Cranch, 116; *The Charkieh*, L.R. 4 Adm. & Eccl. 59; *The Parlement Belge*, 5 P. Div. 197; *The Guj Djemal*, 264 U.S. 90; *The Pesaro*, 277 Fed. Rep. 473; *The Attualita*, 238 Fed. Rep. 909. In addition counsel for the United States rely upon the seventh convention of the Second Hague Conference of 1907, and on the decisions of the United States Court of Claims in *Stovell v. United States*, 36 Ct. Cl. 392, and the *Manila Prize Cases*, 188 U.S. 254, in which, it is argued, the status of the *Nanshan* and the *Zafiro* was established.

We have no difficulty in distinguishing those cases from the one before us. *The Exchange* case had to do with the immunity of warships in foreign ports. So also the other cases first cited have to do with claims to immunity from process while in foreign ports. That is quite a different question from the one before us, which is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of what responsibility attaches to the United States for her actions in Manila Bay, where and while she was acting as a supply ship for Admiral Dewey's squadron, in the naval operations he was then and there conducting, and was under his orders through a naval officer put on board to carry them out. No such situation is presented in the cases cited. In *The Guj Djemal*, 264 U.S. 90, and *Ex Parte Hussein Lufti Bay*, 256 U.S. 616, the Turkish Government owned, possessed, and operated the vessel, but it was engaged in "ordinary commerce under charter to a private trader." It was held that the vessel could be libelled for services and supplies. In *The Pesaro*, 277 Fed. Rep. 473, the ship was owned by the Kingdom of Italy, was in possession of the Italian Government, and was manned by a master, officers, and crew employed by a department of the Government. But it "was engaged in commercial trade, carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the department of the Italian Government having to do with military or naval affairs" (473-4). Even if the case before us were necessarily governed by the question whether immunity could have been claimed for the *Zafiro* in a foreign port, these decisions would not be in point. Even more is

this true of *The Attualita*, 238 Fed. Rep. 909, where the crucial point, as the court decided, was to be found in the circumstance that the Italian Government was not in possession of the ship which it owned.

In the admirable opinion of Judge Mack in *The Pesaro*, 277 Fed. Rep. 473, 481, it is said: "If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily, not upon her ownership, but upon the nature of the service in which she is engaged and the purpose for which she is employed." We agree. But if we carry this out and say that the liability of the state for her actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed, it is obvious that the case before us differs radically from all those which have been cited and on which the United States relies.

It may be conceded that the *Zafiro* does not meet all the requirements of "a converted merchantman" under Convention VII of the Second Hague Conference of 1907. But the purpose of that convention was to distinguish converted merchantmen from privateers and to give them a proper status as ships of war; not to cover such a case as that presented here.

As to the *Manila Prize Cases*, 188 U.S. 254, and *Stovell v. United States*, 36 Ct. Cl. 392, we think, when looked at critically, they go to sustain liability of the United States. One of the findings of the Court of Claims, affirmed by the Supreme Court of the United States, was: "The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew" (188 U.S. 280). Another finding was: "The duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship, controlling the movements of the *Nanshan* . . . , but not to interfere with the internal management and discipline of the ship, and such things as loading and unloading cargo" (Id. 281). The question involved in those cases was whether the merchant officers of the *Nanshan* and *Zafiro* were entitled to prize money for ships taken in the battle of Manila. The District Court held that "the *Nanshan* and *Zafiro* not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in such conditions as to be able to render effective aid if required, are not entitled to share in any of the prize money" (Id. 282-3). The Court of Claims "held on the facts that the *Nanshan* was not at the battle of Manila in such a condition as to enable her to render effective aid if required; that she was performing the functions of a collier, to be protected instead of to act aggressively" (Id. 282). These findings were approved and adopted. They are far from showing that the *Zafiro* at the time in question was a mere merchant ship for whose actions the United States would not be responsible.

From all the evidence we are of opinion that the *Zafiro* was a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.

We have next to inquire whether at the time of the looting in question the Chinese crew were under discipline and officered, so as to make the United States responsible, and to consider how far the United States would be charge-

able for want of supervision by those who had or should have had the crew in charge under the circumstances.

It is well settled that we must distinguish between soldiers or sailors under the command of officers, on the one hand, and on the other hand bodies of straggling and marauding soldiers, not under the command of an officer, or marauding sailors not under command or control of officers. *Hayden's Case*, 3 Moore, International Arbitrations, 2985 ; *Case of Terry and Angus*, Id. 2993 ; *Mexican Claims*, Id. 2996-7. These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In *Donougho's Case*, 3 Moore, International Arbitrations, 3012, a Mexican magistrate called out a posse to enforce an order ; but no responsible person was put in charge and the "poose" became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In *Rosario & Carmen Mining Company's Claim*, Id. 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate, who called out the poose, in not putting it in charge of a proper person or being present himself "to restrain the violence of such an excited body of men." In *Jeanneaud's Case*, 3 Moore, International Arbitrations, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not use the ordinary means of military discipline to prevent it, and their Government was held liable. In the *Mexican Claims*, 3 Moore, International Arbitrations, 2996-7, a Government was held liable where the officers failed to restrain such actions after having had notice thereof. See also *Porter's Case*, Id. 2998. And in the *Case of Dunbar & Belknap*, Id. 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers.

In the case before us, we think the officers were not actually present at the houses when the looting was done. After members of the crew brought some of the property upon the vessel, and one of the officers found where it came from, he went to the houses and took away some articles in order to preserve them for the owners. This is evidently what the Chinese witnesses have in mind when they charge the officers with looting ; for one of the officers tells us that when he found the Chinese so interpreted his good offices, he desisted for the sake of good order. After the matter was drawn to the attention of the naval officers, the vessel was searched and the articles found on board were returned to the claimants. But the damage had been done. Moreover, Captain Whitton's statement that he "stopped anything he saw coming on board" gives the impression that he did not stop with sufficient promptitude the taking of things on land before they could come on board, after he found that plundering was going on. Without regard to this point, however, we feel that there was no effective control of the Chinese crew at the time when the real damage took place. When the *Zafiro* was tied up alongside the company's wharf, where the houses were, the naval officer and the merchant captain went off to look at the Spanish batteries, leaving the crew in charge of the first mate. The latter gave half of the crew leave to go ashore. Captain Whitton says significantly : "You know what Chinese are, especially these times." To let this crew go ashore where these houses were, with no one in charge of them, at a time when

plunder and pillage were certain, and plunder and pillage by the Filipinos had been observed by all the officers, seems to us to have been highly culpable.

It was said in argument that a Government is not responsible for what its sailors do when on shore leave. But we cannot agree that letting this Chinese crew go ashore uncontrolled at the time and place in question was like allowing shore leave to sailors in a policed port where social order is maintained by the ordinary agencies of Government. Here the Spaniards had evacuated Cavite and no one was in control except as the Navy controlled its own men. The nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body. In *Jeanneaud's Case*, 3 Moore, International Arbitrations, 3001, the unusual circumstances were dwelt upon. Here also what might have been proper enough, under other circumstances, became culpable under those which actually obtained. Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrong-doers cannot be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.

We award as follows :

To D. Earnshaw \$4,392 (Mexican).

To A. Young \$1,306.50 (Mexican).

To G. Gilchrist \$458 (Mexican).

Done at Washington, D. C., November 30, 1925.

The President of the Tribunal,

A. NERINCX.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

REVIEW AND DIGEST OF THE DECISIONS OF THE ENGLISH COURTS DURING JANUARY, 1924–DECEMBER, 1925

Note. (One case reported in 1923 is included, and also one case reported by the *Times Law Reports* in 1925, but appearing in the 1926 Law Reports. The numbers opposite the names of cases in the review refer to the Digest immediately following.)

REVIEW

In the judgments in the case of the *Sommelsdijk* (1) the Court of Appeal did not deal with the important and interesting question from the point of view of English Constitutional Law whether acts done by the Crown in the prosecution of war (and in particular in the exercise of belligerent rights at sea) are done in right of the King's prerogative. They decided, however, another question of much greater interest from the point of view of International Law, namely that, whenever under the modern practice a neutral vessel is brought into port for examination on suspicion of carrying contraband, the Prize Court has exclusive jurisdiction over all claims on behalf of owners in respect of the detention and treatment of the vessel and cargo.

One Lord Justice went further and expressed (obiter and tentatively) the opinion that such claims would be within the jurisdiction of the Prize Court even if the vessel or cargo was never brought in at all, provided the claim is made against a person purporting to exercise a belligerent right at sea. In the latter case, if the Prize Court has no jurisdiction, then it is clear that (except in so far as British subjects might have claims), no court in England could entertain them, since such acts would come within the category of Acts of State.

In the period under review there were five decisions of general interest on the application of the general economic clauses of the Peace Treaties. From the decision in *Fried's* case (2) it appears that if an opposing Clearing Office, set up under the Annex to Section III of Part X, declines to put forward a claim and gives the claimant a certificate in accordance with paragraph 25 of the Annex, and the British Clearing Office fails to take steps to get the matter referred for decision as a difference between them under paragraph 16, no objection based on Article 296 of the Treaty of Versailles (or the corresponding articles in other treaties) can then be raised to an action by the creditor to recover the debts in the English courts on the ground that the debts are "enemy debts." This, however, does not prevent an objection being made on the ground that the debts are enemy interests in British territory and are charged under Article 297. It was also decided that the question of the ownership of such debts, when the debtors are in England, must be decided by English law.

Luxardo's case (3) and the *New York Life Insurance Company* case (4) both contain decisions on the meaning of the words "subject to contrary stipula-

tions" in Article 269 (b) and Article 297 (b) of the Treaties of St. Germain and Versailles respectively. In the former it was held that the provisions of Article 206, respecting the liquidation of the Austro-Hungarian Bank, and in the latter that the provisions of paragraph 11 of the Annex to Section V of Part X, respecting the maintenance in force of life insurance contracts, were not "contrary stipulations" and did not except the assets of the Bank or moneys payable in England on life insurance policies from the operation of the charges on enemy property and interests created under those articles. The latter case also contained a decision as to the "situs" of a debt of interest in connexion with the general principles of Private International Law as well as for the purposes of the interpretation of the Peace Treaties. Debts are said in the first place to be situated in the jurisdiction where the debtor is to be found since that is where payment can best be enforced, but in cases where the debtor is to be found equally well in more than one jurisdiction, as in the case of a company with branches and offices in many parts of the world, the terms of the contracts or surrounding circumstances must be looked at, and if they point to one place rather than another as the *proper* place of payment, the debt is to be held to be situated in that place rather than the place where the central office is or the place where the company is incorporated.

Hahn v. Public Trustee (5), while containing information of considerable interest on the subject of German Nationality Law, is also of general interest as a decision that, where a person, who has admittedly at some time been a German national, claims that his property is not subject to a charge under the Peace Treaties on the ground that at the relevant date he had ceased to be so, the onus of proof rests on him to prove that by German law he had lost German nationality.

In *Rothschild's* case (6) it was held that the expression "nationals of the former Austrian Empire" in Article 249 (b) of the Treaty of St. Germain meant persons who were nationals of the former Austrian Empire on October 28, 1918, when that Empire ceased to exist, and the only exceptions to the charge created under that article on the property of such nationals are those specified in the third paragraph of the same article and are not to be found in any other part of the treaty.

There was also another group of four decisions on the subject of the immunity of foreign sovereigns from being impleaded in the English courts. In a case in which the *United States Shipping Board* were defendants (7) it was held that the fact that a foreign sovereign was engaged in trade did not render him or his agent liable to be sued even in respect of a trading transaction. The dicta in the *Charkieh* to the contrary have now finally been laid to rest so far as the common law is concerned. The *Duff Development Company* case (8) is in effect a confirmation by the highest tribunal of *Mighell v. the Sultan of Johore* and finally decides, in the words of Lord Sumner, that "a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. . . . It is not the business of the court in considering the answer given by a Secretary of State to inquire whether . . . [a person declared therein to be a sovereign] is entitled to be recognized as a sovereign in international law . . .," and that a court can only be given jurisdiction over a foreign sovereign by a submission by such

sovereign at the moment when the jurisdiction of the court is invoked and not by any previous agreement between the parties.

The earlier of the two cases of the *Jupiter* (9) is an important decision on the operation of the immunity of a foreign sovereign with reference to an action *in rem*. An action *in rem* is brought in form against a "thing," and no person is a named defendant, but, since the judgment in the action may award the property in the "thing" to the Plaintiff and give him a title thereto valid—not merely against persons who become parties to the action but against all the world—any person who claims a right of property therein is in fact compelled to assert his title and have it adjudicated on by the court, i. e. in effect to become a defendant. Hence it was decided in this case that if a foreign sovereign claims that the "thing" is his property, the court cannot proceed further in an action *in rem* without his consent, for to do so would be to implead him. It seems, therefore, to follow that a foreign sovereign can always put an end to any action *in rem* by a simple statement that he claims property in the thing, and that this is so whether or not he is in possession at the time. It is otherwise of course with regard to actions *in personam* for a judgment in such an action only prejudices the title of the parties to the action. The second case of the *Jupiter* (10) shows that such a declaration on the part of a foreign sovereign does not operate as a decision that the property is legally his so as *ipso facto* to be conclusive of the title of a private person to whom he transfers or purports to transfer the "thing," and secondly that, when the title to a piece of property depends on foreign law, the court does not accept as conclusive declarations by a foreign sovereign or by his diplomatic representatives or qualified officials as to the effect of his law, but determines the question as a matter of fact after hearing the evidence of foreign lawyers.

The case of *The Russian Commercial and Industrial Bank* (11) is another illustration of the practice of the English courts in the last respect. The House of Lords there came to a conclusion as to the effect of certain foreign legislation, which was possibly at variance with the official view in the country in question. *Hahn's* and *Rothschild's* cases (*supra*) are further illustrations of the same practice with regard to official certificates as to the nationality law of foreign countries. In the latter case it was held that such certificates were not even admissible as evidence. Two further cases in which the *Soviet Republic* were Plaintiffs (12 and 13) are applications with regard to foreign Governments of the practice laid down by the House of Lords in (8). For the purposes of the English courts the Government of a foreign country is that Government which is recognized as the Government of the country by the Crown.

There were six decisions in the period under review on various points of Private International Law. In the *Tubantia* (14) the Court of Admiralty entertained an action of trespass with respect to a Dutch ship on the bed of the high seas.

In *Eustace v. Eustace* (15) the Court of Appeal held that domicile as well as residence gives jurisdiction to an English court in a suit for judicial separation. The view expressed by the most authoritative English writers on Private International Law had only admitted residence as a source of jurisdiction. In *Rudd v. Rudd* (16) the English court refused to recognize a foreign divorce (assuming that the matrimonial domicile was within the jurisdiction of the court which had pronounced it) on the ground that, the respondent having received

no actual notice of the initiation of the proceedings although all requirements prescribed by the practice of the foreign court with regard to notice had been fulfilled, this was a defect which would make it contrary to natural justice to treat the foreign judgment as valid. *Seager v. Seager* (17) illustrates a new statutory exception to the rule that an English court has only jurisdiction in divorce in cases where the matrimonial domicile is in England. *In re Cunningham* (18) shows that in the construction of a will very conclusive evidence of the intention of the testator to the contrary is required to displace the rule that a will must be interpreted in the light of the law of the testator's domicile.

The rules respecting service out of the jurisdiction are of general interest since in fact they define the jurisdiction which the English courts claim for themselves. *Rosler v. Hilbery* (19) is an important decision on this subject. It illustrates the recognition by the English courts of the principle of "forum conveniens" and secondly that the court will not assume jurisdiction against a person abroad on the ground that "an injunction is sought as to something to be done in England," unless such an injunction is really part of the substantive relief which is claimed and not merely ancillary thereto, and that it will not assume jurisdiction on the ground that "the person out of the jurisdiction is a necessary and proper party to an action properly brought against another person in England" unless the person in England is a primary defendant against whom substantive relief is claimed and not merely a subordinate and secondary defendant.

1. *Netherlands American Steam Navigation Co. v. H. M. Procurator-General.*
1926 1 K.B. 84 (C.A.).

Appeal from the War Compensation Court.

THE claimants, a Dutch company, claimed compensation for the detention of their vessel, the *Sommelsdijk*, while on a voyage from Buenos Ayres to Sweden with a cargo of maize. On her arrival in the Downs on October 15, 1915, she was visited and partially searched by a British examination boat on suspicion of carrying contraband. She was detained at anchor in the Downs till October 26 when an armed guard was put on board and she proceeded to Gravesend accompanied by a torpedo-boat. On October 29 the cargo was discharged and the ship thoroughly searched; no contraband was found and she was released on December 6. The owners claimed for 41 days' detention under section 2, sub-section 1 (b) of the Indemnity Act, 1920, which gives power to the War Compensation Court to award compensation in respect of an "interference with property" through the exercise of "a prerogative right of His Majesty". The Compensation Court held that the right of visit and search was a prerogative right of the Crown and that they had jurisdiction to entertain the claim. The Procurator-General appealed. It was contended on behalf of the Procurator-General:

(1) that the belligerent right of visit and search is not a "prerogative right of His Majesty"; that the prerogative, so far as it relates to acts done outside the British Dominions, is confined to acts done by the Crown to its own subjects; that the right of visit and search arises, not from the common law, but is simply a right given to belligerents by international law, and acts done thereunder are national acts. See *The Zamora* 1916 2 A. C. at p. 92; *In re Ferdinand ex-Czar of Bulgaria* 1921 1 Ch. at p. 139.)

(2) That there was a sufficient seizure or capture of the ship in Prize to give the Prize Court jurisdiction. Formal seizure is not necessary (see *The Montana* 1914 1 Pr. Cases 75, 85), or alternatively that the jurisdiction of the Prize Court does not depend on capture but on the question whether what was done was done in the exercise of a belligerent right.

(3) That, if the Prize Court had jurisdiction, that jurisdiction was exclusive (see *The Roumanian* 1916 2 A. C. at p. 92. *The Zamora* 1916 2 A. C. at p. 92).

(4) That exclusive jurisdiction is preserved by the Indemnity Act, section 3.

The claimants contended

(1) That there was no seizure in prize and detention without seizure does not give the Prize Court jurisdiction; that vessel only becomes prize after captor has taken possession "*animo retinendi*".

(2) That prerogative of Crown extends to the "management and prosecution of war" (Chitty, *Prerogatives of Crown*, p. 44) and that right of visit and search is a prerogative right.

The Court of Appeal allowed the appeal on the grounds:

(1) That the jurisdiction of the Prize Court in matters within that jurisdiction is exclusive and the exclusiveness of that jurisdiction is preserved under the Indemnity Act by section 3.

(2) That the commission issued by the Crown at the beginning of the war "authorized and required" the Prize Court to take cognizance of and judicially to proceed upon all manner of captures, seizures . . . of all ships . . ." and that the modern practice, made necessary by the size of modern ships and the presence of submarines, of carrying out the right of visit and search by bringing the neutral ship into port for examination constitutes a "seizure" within the meaning of the commission (The L.J.J. found support for this view in the advice of the Prize Court in *The Roumanian 1 Prize Cases* at p. 540); Story on Prize Courts (Ed. Pratt, 1854, p. 31); and an unreported decision of the President in the *F. J. Lisman* on November 19, 1919).

Atkin L.J. added: "It may well be that a claim for injury to goods or to person made against a person exercising a belligerent right of search on the high seas, though neither vessel nor goods were ever brought in, might be held to be exclusively cognizable in a Prize Court. Good reasons could be adduced why it should."

2. *Fried. v. Administrator of German Property and the Controller of the Clearing House.*
1925 Ch. 757 (Tomlin J.).

The Plaintiff in these proceedings claimed a declaration that he was free to collect himself certain debts owing by persons in England on August 4, 1914, (and still unpaid) to the firm of Fried Hesse & Co. of Berlin.

In August, 1914, the Plaintiff, at that time a national of the Austro-Hungarian Empire, and Rosener, a German national, carried on business in partnership, having equal shares in the business, as Fried Hesse & Co., which was registered according to German law as a partnership firm with its seat in Berlin.

In 1915 Rosener retired and the Plaintiff took over the whole business and was registered as sole proprietor.

On the signing of peace the Plaintiff became, by virtue of Article 70 of the Treaty of St. Germain, a Czechoslovak national and, therefore, his property was exempted by Article 249 (b) of that treaty from the operation of the charge imposed under that Article.

The Plaintiff in the first instance sought to recover the debts due to the firm of Fried Hesse & Co. by making a claim through the German Clearing Office under Article 296 of the Treaty of Versailles, on the ground that these were debts payable by English nationals to a German national.

The German Clearing Office, however, declined to notify the claim to the British Clearing Office and gave the Plaintiff a certificate, pursuant to paragraph 25 of the Annex to Section III of Part X of the Treaty, which provides that "the enemy creditor" [having received such certificate] "shall be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him".

The Defendant resisted the claim on the grounds:

(1) That the moiety of the debts representing Rosener's original interest fell within paragraph 1 of Article 296 of the Treaty of Versailles and that consequently it was only recoverable by the Clearing Office under the Treaty of Peace Order, clause 1 (iv); or alternatively:

(2) That such moiety constituted on January 10, 1920, "rights and interests belonging to a German national within British territory" and were accordingly charged by the provisions made under Article 297 (b) of the Treaty of Versailles.

Tomlin J. held:

(a) that in German law a partnership has no separate legal existence apart from the partners who compose it and that the assets of the partnership belong to the partners in proportion to their shares.

(b) that in German law the ownership of the whole business and its assets had passed to the Plaintiff in 1915, including all debts owing to the firm by its debtors.

(c) That since the British Clearing Office had accepted the course taken by the German Clearing Office or had at any rate failed to set up any difference between the two Clearing Offices which ought to be referred for decision under paragraph 16 of the Annex, the Defendant could not dispute the rights given to the Plaintiff under paragraph 25 of the Annex on the ground that the debts fell under Article 296.

(d) That by English law the share of Rosener did not pass to the Plaintiff in 1915, since by section 6 of the Trading with the Enemy Amendment Act, 1914, it was provided that "No person shall by virtue of any assignment of any debt . . . made in his favour by . . . an enemy . . . have any rights . . . against the person liable to pay . . . the debt unless he proves . . ." (Then follow various conditions which the Plaintiff did not claim to have satisfied): that Rosener was an enemy and the transaction in 1915 was (*inter alia*) an assignment to the Plaintiff of a share of debts due to Rosener and, therefore, conferred no rights in English law.

(It had been argued that there was a territorial limitation to the Act and that section 6 did not deal with transactions between two persons both of whom were in an enemy country but was directed against transactions which might afford assistance to the enemy in time of war. It may be observed, however, that the debtors were in England and, therefore, England was the "situs" of the debts.)

(c) That statutes like the Trading with the Enemy Amendment Act were "exceptional war measures" whose validity was recognized and confirmed by Article 297 (d) of the Treaty of Versailles.

(d) That English law governed the transaction and, therefore, a moiety of the debts still belonged to Rosener and was charged under Article 297 of the treaty and that the Plaintiff is not free, without the consent of the Defendant, to collect that moiety of the debts.

3. *Luxardo v. Public Trustee*, 1924 2 Ch. 147 (C.A. affirming decision of Romer J., 1924 1 Ch. 1).

The court held in this case that the provisions of Article 206 of the Treaty of St. Germain respecting the liquidation of the Austro-Hungarian Bank were not a "contrary stipulation in the Treaty" within the meaning of Article 249 (b) and, therefore, the property of the Bank in England was subject to the charge imposed in this country under Article 249 (b) of the treaty as being the property of a national of the former Austrian Empire or of a company controlled by such nationals, and that the Plaintiffs, who were receivers of the Bank appointed under Article 206 by the Reparation Commission, must apply to the Austrian Government for compensation for the loss of the property of the Bank in this country under paragraph (i) of that Article.

4. *New York Life Insurance Co. v. Public Trustee*, 1924 2 Ch. 101, C.A. (reversing Romer J., 1924 1 Ch. 15).

The Plaintiff company was incorporated in New York, where its central office was situated, and had a branch in London and in most of the capitals of Europe, the branch in Paris being its head office for Europe. The company brought an action against the Public Trustee, as the authority appointed under the Treaty of Peace Order, 1919, to liquidate enemy property, for a declaration that moneys payable on January 10, 1920, by the Plaintiff company under a number of life policies issued by them to certain German nationals were not charged by the Treaty of Peace Order under Article 297 (b) of the Treaty of Versailles.

The Court held (1) (affirming Romer J. on this point) that the provisions of paragraph 11 of the Annex to Section V of Part X of the treaty did not constitute "contrary stipulations" within the meaning of Article 297 (b) and that "the mere fact that life insurance contracts are maintained in full force" does not prevent their also falling, in proper cases, under Article 297 and the consequent charge on them "since the right to have those contracts enforced, which is safeguarded by Article 299, may still inure to the benefit of German nationals, even though those contracts fall to be charged under Article 297 because in that case the German national has the right to compensation by his own Government. (2) That the debts of the Plaintiff Company to the German nationals were "interests" of German nationals situated within England and, therefore, fell under Article 297 (b) of the treaty. The Court refused the declaration asked for.

The grounds on which the second part of the decision was based are as follows :

The Court approved and adopted the principle stated by Professor Dicey at p. 342 of the third edition of his *Conflict of Laws*: "Debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced". The company having offices in both London and New York was subject to the jurisdiction of the English and the American courts, and debts could be enforced against them in either place, but the insurance policies contained provisions in some cases that the money was to be paid at the London offices of the company and in the remaining cases that they were to be construed according to English law, and thus the very terms of the contract of insurance localized the place where the debts were to be paid as London, and consequently of the two places where the debt could be enforced, London was the place where they were properly recoverable.

5. *Hahn v. Public Trustee*. 1925 Ch. 715 (Astbury J.).

This was an action brought by the Plaintiffs against the Defendant as Custodian of enemy property, for the release of their property on the ground that on the date of the coming into force of the Treaty of Versailles (January 10, 1920) they were not German nationals. The Plaintiffs were three brothers, all born between 1863 and 1870 at Idar in the district of Birkenfeld in the State of Oldenburg in Germany. They resided at Idar till 1893. The eldest, an ex-officer in the German army, lived in London in 1893-5, and in Paris in 1895-1914. He lived again in London till June, 1915, when he was interned. His visits to Germany between 1893 and 1915 were confined to six weeks' military training in 1896 and visits to his mother at Idar at Christmas.

The second son lived in London from 1893 to 1915, when he was interned. He only returned to Germany on short visits to his mother twice a year.

The third son lived in London from 1892 until he was interned in 1915. He only returned to Germany for yearly visits of one week to his mother.

None of the Plaintiffs had between 1893 and 1915 ever registered at a German consulate or taken out German passports, but declared their nationality to be German in 1915 and made a claim in 1921 against the Defendant through the German Clearing Office. All three were repatriated in 1917 or 1918, and alleged that on their return they were registered by the police at Idar as stateless. In 1920 they settled at Amsterdam where they still were.

The Plaintiffs contended that they had lost their German nationality by ten years' uninterrupted residence abroad within the meaning of Section 21 of the German Nationality Law, 1870, and submitted evidence, including certificates from the Government of Birkenfeld, to that effect.

The principal question was whether the Plaintiffs' visits to Germany constituted an interruption of residence abroad within the meaning of Section 21.

Astbury J. held :

(1) That since the Plaintiffs were alleging that they had lost their German nationality, the onus lay on them to prove it and they must satisfy the court on what the German law on the point at issue was.

(2) That the certificates, which were admittedly only *prima facie* evidence and open to review in any German court, were not conclusive in any English court, and the onus was on the Plaintiffs to substantiate them.

(3) That having regard to the conflict of opinion in the German courts as to what constitutes an interruption within the meaning of Section 21 of the German Nationality Law, on which the highest court of appeal in Germany, the court of Leipzig, had taken a view contrary to that for which the Plaintiffs contended, the Plaintiffs had failed to discharge the onus of proving that by German law they had lost their nationality on January 10, 1920.

5. *Rothschild v. Administrator of Austrian Property*. 1923 2 Ch. 542 (Eve J.).

In this case the Plaintiff sought a declaration that his property in this country was not chargeable under the Treaty of Peace (Austria) Order 1920 (2), S. 1, subsect. ix, which puts into force Article 249 (b) of Section IV of Part X of the Treaty of St. Germain. The Plaintiff had been born in Vienna and was before and during the war a subject of the Austro-Hungarian Monarchy. By a decree made on July 9, 1920 (the Treaty of St. Germain came into force on July 16, 1920) by the Political Administrator of the District of Moravia Ostrava in Bruno, citizenship of the Czechoslovakian Republic was granted to him, and the Plaintiff contended that by reason of the operation of Article 230 of the treaty "Austria undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the

Allied and Associated Powers . . . and to regard such persons as having in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin", he had ceased to be a "national of the former Austrian Empire" and his property did not (within the words of Article 249 (b) "belong at the date of the coming into force of the present Treaty . . . to a national of the former Austrian Empire" and was, therefore, not chargeable under that Article.

It was held, however, that the expression "nationals of the former Austrian Empire" meant persons who were nationals of the Austrian Empire, when there was such an Empire—that is to say, down to October 28, 1918, when the Empire ceased to exist, and did not refer to nationality of the present Austrian Republic; and that the only exceptions to the operation of the "charge" created by the two first paragraphs of that article on the property of persons coming within that description are those laid down in the third paragraph of that article itself—namely persons who acquire the nationality of an Allied or Associated Power under the provisions of the treaty itself (Articles 72-77) and no other exceptions are to be found in any other part of the treaty.

The Plaintiff did not acquire Czechoslovakian nationality under the provisions of the treaty and was held, therefore, not to come within the terms of the exception.

7. *Compania Mercantil Argentina v. United States Shipping Board.*
40 T.L.R. 601 (C.A.).

The Defendants were, according to a certificate of the United States Ambassador in London, "A department of State administered by commissioners nominated by the President of the United States with the advice of the Senate" in pursuance of the United States Shipping Act of 1916, and owned a fleet of ships which was used for commercial purposes and created by that Act for the purpose of developing a naval reserve and merchant marine to meet the requirements of the commerce of the United States. The Plaintiffs claimed the return of freight overpaid in connexion with a cargo of maize for which the ship *Onokama*, belonging to the defendants, had been chartered by the Plaintiffs. The Defendants applied to set aside the writ on the ground that being a Department of the Government of the United States of America, they were a sovereign body and could not be sued in the English courts. It was argued for the Plaintiffs, relying on dicta of Sir R. Phillimore in the *Charkieh* (L.R. 4 A. & E. 59), that the Defendants had lost their immunity with respect to these vessels because they were employed in private trade, but the Court of Appeal held:

(1) The question whether the vessel was or was not engaged in private trading did not really arise in this case, since the proceedings were taken *in personam* and not *in rem* against the vessel.

(2) That the Defendants were representatives of the United States.

(3) That the dicta in the *Charkieh* had already been over-ruled in the *Parlement Belge* (5 P.D. 197), followed in the *Porto Alexandre* (1920, p. 30) and there was no authority anywhere to be found for the view that the mere fact that a sovereign is engaging in some private trading business subjects him to processes in the courts of a foreign country.

8. *The Duff Development Company Ltd. v. The Government of Kelantan.*
1924 A.C. 797.

Kelantan is a state in the Malay Peninsula and its Government (acting by the Crown Agents for the Colonies) entered into an agreement in 1912 granting to the Duff Development Company Ltd. certain road-making and mining concessions in the state. The deed of agreement contained a clause providing for the submission of disputes to arbitration and stating that "this shall be deemed to be a submission to arbitration within the Arbitration Act, 1889". Disputes having arisen, recourse was had to arbitration and the arbitrator made an award in favour of the company and directed the Government to pay the costs of the arbitration. The Government then in 1921 moved the Chancery Division of the High Court under Section 11 of the Act of 1889 to set aside the award on the ground of error of law appearing on the face of the award, but the application was in March, 1922, dismissed with costs and this decision was confirmed on appeal by the Court of Appeal and the House of Lords.

The Company then applied by originating summons under section 12 of the Act to enforce the award and an order was made, and a further garnishee order was made attaching certain moneys owing to the Government by the Crown Agents for the Colonies for the payment of the costs of the arbitration.

The Government then applied to set aside this order on the ground that the state of Kelantan was an independent sovereign state and that the Court had no jurisdiction. This application was resisted by the Company on the grounds : (1) that Kelantan was not an independent state, and (2) that in any event by agreeing to arbitration clauses and by its application under section 11 of the Act of 1889 to set aside the award, the Government had submitted to the jurisdiction of the Court. In reply to a request by the Court for information as to the status of Kelantan the Secretary of State for the Colonies wrote a letter stating that " Kelantan is an independent state . . . and that His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan ". The letter further explained that prior to 1909 the relations between Siam and Kelantan had been regulated by an agreement of 1902 and that by a treaty signed at Bangkok in 1909 such rights as the King of Siam had possessed over the territory had been transferred to His Majesty the King, but that not all the rights possessed by Siam were ever exercised by His Britannic Majesty and that the present relations between His Majesty the King and the Sultan of Kelantan were regulated by an agreement of friendship and protection signed in 1910, a copy of which was enclosed. By the terms of the agreement of 1910 the Sultan of Kelantan engaged himself to have no political relations with any foreign Power except through the medium of His Majesty the King of England and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of an adviser appointed by His Majesty.

On these facts it was argued on behalf of the Company before the House of Lords : (1) that the question whether a state is an independent sovereign for the purpose of claiming immunity from process is a question of law for the court to decide, and that a state which has not the right to manage its internal affairs was not independent ; and (2) that if Kelantan was a sovereign state, it had submitted to the jurisdiction of the court and accepted the liabilities of an ordinary litigant.

The House, however, (1) held unanimously that the status of any foreign Government was a matter of which the Courts of England take judicial notice and, instead of requiring proof to be furnished by the litigants on this subject, the Courts act on their own knowledge or, if necessary, obtain the requisite information for themselves ; that the proper and best source of information on the subject was that which the Crown permitted a Secretary of State to give on its behalf, and that the Courts must, therefore, accept the declaration of a Secretary of State.

Lord Sumner added the following explanation : " It is the prerogative of the Crown to recognize or to withhold recognition from states or chiefs of states and to determine from time to time the status with which foreign Powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English court of law, and the best evidence of such recognition is the statement duly made in regard to it in His Majesty's name. . . . It is not the business of the court in considering the answer given by a Secretary of State to inquire whether . . . the Sultan was entitled to be recognized as a sovereign in international law . . . "

" If the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best, subject of course to the presumption that in the case of a new organization, which has *de facto* broken away from an old state still existing and still recognized by His Majesty, the dominion of the old state remains unimpaired till His Majesty is pleased to recognize the change."

With regard to (2) the Court held (Lord Carson dissenting) (a) per Lord Finlay and Lord Dunedin, that the Government had not agreed to submit to the jurisdiction of the Court for the enforcement of the award against it ; (b) per Lord Cave and Lord Dunedin, that to be effective as a waiver of immunity, the submission must be made at the moment when the jurisdiction of the Court was invoked and consequently no inquiry into the conduct of or agreements between the parties at an early date could be relevant, as per Lord Sumner, the Court could only be given jurisdiction by an act of the foreign sovereign towards the Court itself and not by any agreement with a third party.

On both these questions the House of Lords confirmed the earlier decision of the Court of Appeal in *Mighell v. Sultan of Johore* 1894 1 Q.B. 149.

9. *The Jupiter* 1924 P. 236 (C.A.).

An action had been instituted by the Compagnie Russe de Navigation à Vapeur et de Commerce by a writ *in rem* addressed to the " s.s. *Jupiter* and all persons claim-

ing any right or interest in the said steamship." The plaintiffs claimed as sole owners of the s.s. *Jupiter* to have possession of the vessel decreed to them. The *Jupiter* was registered as "of the port of Odessa" and no other port of registry was claimed. It was alleged on behalf of the plaintiff company that the head office of the company had formerly been at Petrograd with a trading centre at Odessa, and that the company owned the *Jupiter* and a number of other ships; that in 1919 the ships and staff of the company had been moved to Marseilles, from whence their trading had from that date been carried on: that when freights became unprofitable the *Jupiter* was laid up in Dartmouth harbour, flying the old flag of the Russian mercantile marine, in charge of a master whose wages were paid by the plaintiff company: that in 1924 the master, without any authority from or the knowledge of the plaintiff company, handed over the ship to the Trade Delegation of the Union of Socialist Soviet Republics, and the plaintiffs thereupon issued their writ.

The Union of Socialist Soviet Republics moved to set aside the writ on the ground that they were the owners of the vessel under a decree of nationalization of January 26, 1918, nationalizing the Russian mercantile marine, and were a sovereign state, and declined to submit to the jurisdiction of the Court. Hill J. held (1) that a writ *in rem* is a writ directed against the property in the ship which compels the owner to appear and submit to jurisdiction or allow judgment to go against his property by default; (2) the ship being a Russian ship and the property in the ship being claimed by the Russian sovereign who did not consent to the jurisdiction, the Court had no jurisdiction to entertain proceedings against the property in the ship or to investigate the assertion of the Russian sovereign that the ship was his property, and accordingly he set aside the writ. Hill J., however, observed: "I am not deciding whether I should be bound by the assertion of the Government of the Union in respect of a ship which was not Russian. . . . My decision relates to a ship which is Russian and, therefore, *prima facie* subject to Russian law with regard to title and transfer of ownership." The Court of Appeal affirmed the judgment of Hill J. but expressed a unanimous opinion that the "registration of the ship in Russia was a quite irrelevant fact."

Banks L.J. said: "It seems to me that the necessary result of these proceedings is to call upon the Soviet Government to assert its title and to have the question of the ownership or of the right to possession of this vessel litigated in the courts of this country. This is not admissible."

Atkin L.J. said: "We do not determine (this appeal) on the footing that this ship is in fact the property of the Russian Soviet Government. This may or may not be the fact. We do not determine it on the ground that as the Russian Soviet Government claims the ship as their property this is conclusive proof that it is their property in these courts. . . . I decide it on the sole ground that this process, by the very nature of it, is an attempt to implead the Russian Soviet Government, and the Court has no jurisdiction to do that!"

10. *The Jupiter* (No. 2) 1925 P. 69 (C.A.).

The ship in this action was the same as that in the immediately preceding case. In September, 1924, after the decision of the Court of Appeal, the Arcos Steamship Company, Ltd., of London, acting on behalf of the Russian Soviet Government, purported to sell the *Jupiter* to an Italian corporation, the *Cantiere Olivo Societa Anonima*, and undertook to indemnify the buyers against any claims against the vessel in British or Italian courts by third parties, arising out of circumstances prior to delivery to the buyers. In October, 1924, the Compagnie Russe de Navigation à Vapeur et de Commerce again issued a writ *in rem*, claiming a declaration pronouncing them to be the lawful owners of the vessel, and possession, and the Italian corporation appeared as defendants and served notice to set aside the writ on the grounds:

(1) that the action was between foreigners for the possession of a foreign ship and had been instituted without the consent of the defendants and without any request from the representative of the foreign state of which either of the parties were nationals, and that the Court had no jurisdiction, or alternatively ought not in the exercise of its discretion to entertain the action;

(2) that by a nationalization decree of the Russian Soviet Government the ship became the property of that Government and had been transferred to the defendants;

(3) that by reason of legislation in Russia, the plaintiff company had ceased to exist;

(4) that the ship having been sold by the Russian Soviet Government free from incumbrances, to allow the action to proceed would indirectly implead a foreign state.

(2) and (3) were supported by an affidavit by the Russian Chargé d'Affaires in London.

Duke P. declined to set aside the writ, and his decision was confirmed by the Court of Appeal.

As to contention (1), the Court of Appeal held that there was jurisdiction in the Court under section 4 of the Admiralty Court Act of 1840, and that it was matter of discretion.

Bankes L.J. said: "Matters have progressed very far since that time (the time when Lord Stowell expressed the opinion that the Court did not exercise that jurisdiction in the absence of these consents or requests) and it is common practice now for these courts to adjudicate on disputes between foreigners or to ascertain the foreign law as a matter of fact and to apply it."

As to contention (4), in the words of Atkin L.J.: "The Russian Government do not claim at the moment to be owners or to have the right of possession though they do say that they passed their title to the defendants. Under these circumstances it seems to me to be a mere question of fact or of law as to whether or not the defendants, who are not a sovereign state, have in fact got a title to this ship and no question therefore of impleading the foreign sovereign arises."

The Court of Appeal thought that the questions raised by contentions (2) and (3) must be reserved for the trial of the action.

11. *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*.
H.L. 1925 Ac. 112.

In this case an action was brought in the name of a Russian Bank, which in 1914 had its head office in Petrograd and a branch office in London, the manager of which had a Power of Attorney to bring actions in the name of the Bank. The defendants in their defence alleged that by the operation of various decrees of the Soviet Government in and after 1918 nationalizing banking in Russia, the Plaintiff Bank had ceased to exist and disputed the authority of the London Branch Manager to bring the action.

The House of Lords (overruling the Court of Appeal on this point) held upon the construction of the decrees of the Soviet Government that the Defendants had not proved that the Plaintiff Bank had been dissolved or that the property in Bond claimed in the action was no longer in the Bank.

This case is of general interest as an illustration of the practice of the English courts of determining questions turning on the construction of foreign legislation by framing its own opinion in the matter after hearing the opinions of private lawyers, experts in the national law in question.

12. *Union of Soviet Socialist Republics v. Belarew*. 42 T.L.R. 21 (Branson J.).

13. *Union of Soviet Socialist Republics v. Onow*. 69 S.J. 676 (Acton J.).

It was held in these cases that the Soviet Government of Russia, having been recognized by the British Government as the *de jure* sovereign of that country, was entitled to the possession and custody in England of the records and state archives deposited here before the revolution by the former Czarist Government of Russia. These cases are thus recent authorities illustrating that the principle of Public International Law, that a new Government of a country exercising sovereignty therein succeeds to all the rights and liabilities of the previous sovereign, is also a principle of English law, and also that, according to the practice of the English courts, the answer to the question whether a revolutionary Government claiming that it is the sovereign in its country is or is not justified in its claim, is made to depend on whether such Government has or has not been recognized by the British Government.

14. *The Tubantia*. 1924 P. 78 (Duke P.).

The Dutch steamship *Tubantia* had been sunk in 1916 by a German warship and lay at the bottom of the North Sea, one hundred feet deep at a point fifty miles from the English coast and from twenty to twenty-seven miles from the coasts of France, Belgium, and Holland. In these circumstances it was impossible to raise the ship.

The Plaintiffs, throughout the summer of 1922 and from April, 1923 till the time when the Defendants came on the scene, worked, whenever weather permitted, to save her cargo and had cut a hole in one of the holds, buoyed the wreck and extracted at a great cost cargo of little value. The Defendants, also British subjects, were rival

salvors, who, arriving with a well-equipped and British registered ship, sent down divers and interfered with the Plaintiffs' operations with the intention of themselves securing possession of the wreck and cargo to the exclusion of the Plaintiffs or of establishing themselves in joint occupation.

The Plaintiffs brought an action for an injunction to restrain the Defendants from interfering with their operations and for damages for trespass.

The President held, that though, as decided in the *British South Africa Co. v. Companhia de Moçambique*, the Supreme Court of Judicature has no jurisdiction to entertain an action of trespass to land situated abroad, the Court of Admiralty had undisputed jurisdiction in a suit respecting injurious acts done on the High Seas,¹ and that though there was no proof or presumption sufficient to convince him that the wreck was "res derelicta" in the sense that her Dutch owners had lost their rights of property in her, nevertheless the Plaintiffs had acquired in the wreck the rights of possession of a salvor and he made the order for which the Plaintiffs prayed.

15. *Eustace v. Eustace*. 1924 p. 45 (C.A.).

The Court decided in this case that there is jurisdiction in the Probate Divorce and Admiralty Division to decree judicial separation at the suit of a wife where the husband was domiciled in England, although at the date of the institution of the suit he was not resident in the country. Horridge J. had decided (and Dicey, *Conflict of Laws*, Rule 50 and notes thereon, see Illustration 7, and Westlake, *Private International Law*, § 49, had expressed the same view) that residence was necessary to found jurisdiction in a suit for judicial separation, a view which was founded on § 22 of the Matrimonial Causes Act, 1857, which lays it down that in matrimonial causes, other than proceedings for divorce a vinculo, the Court shall proceed on principles as nearly as may be conformable to those on which the Ecclesiastical Courts had formerly given relief. The Ecclesiastical Courts could only entertain matrimonial causes where the parties were resident within their jurisdiction. The Court of Appeal, following dicta of the House of Lords in *Udny v. Udny* and *Bell v. Kennedy*, held, however, that domicile is a primary source of jurisdiction for determining any question of "personal rights and relations" and that section 22 did not have the effect of limiting the jurisdiction of the Court over persons to that possessed by the Ecclesiastical Courts, and Duke P. in his judgment confirmed a dictum of Jeune P. that "domicil gives jurisdiction not only in suits for dissolution but likewise in suits for judicial separation" and said: "Domicil gives jurisdiction to decree judicial separation and the jurisdiction also arises where there is residence of the respondent."

16. *Rudd v. Rudd*. 1924 P. 72 (Horridge J.).

A petition for restitution of conjugal rights was brought by a wife for the purpose of testing the validity of a divorce procured against her by her husband in 1920 in the state of Washington, U.S.A. The wife was in England at the time of these proceedings and first heard of these proceedings in 1921, although the notice required by the practice of the court had been given—namely the posting of the complaint in the action in a registered letter and an advertisement for seven consecutive weeks in the *Seattle Weekly News*. The registered letter had been sent to the wrong address. The parties had been domiciled in England. The courts of the State of Washington only require residence, not domicile in the strict sense, to found jurisdiction. Horridge J. declared that he was not satisfied that the husband had become domiciled in the United States; and, since the onus of proof rests on the party which alleges a change of domicile, he was prepared to make a decree on that ground, but he actually based his decision on the ground that the Plaintiff had received no notice of the proceedings and in the words of Williams L.J. in *Pemberton v. Hughes*, there was "a defect in

¹ The President referred on this point to Blackstone's *Commentaries*, iii. 106: "Injuries cognizable by the courts maritime. The Statute 15 Rich. II C. 2 declares that the Admiral hath no manner of cognizance . . . of any wreck of the sea: for that must be cast on land before it becomes a wreck. But it is otherwise of things flotsam, jetsam and lagan, for over them the Admiral hath jurisdiction as they are in and upon the sea."

'Lagan' is when the goods which are so cast into the sea are so heavy that they sink to the bottom and the mariners to the intent to have again tie to them a buoy. *Constable's case*, 1601, 5 Rep. 106a.

the initiation of the proceedings . . . which would make it contrary to natural justice to treat the foreign judgment as valid, a case where there had been not only no service of process but no notice of it."

17. *Seager v. Seager*. 1925 P. 105 (Swift J.).

This case is an illustration of an exception recently introduced by Statute to the general rule of English law that an English court has no jurisdiction in suits for the dissolution of marriage unless the matrimonial domicile is in England. The parties were British subjects domiciled in Turkey, and the wife had obtained a decree nisi from His Britannic Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte in July, 1924—a court existing under the capitulations. On August 6, 1924, the Treaty of Lausanne came into force and the capitulations and His Britannic Majesty's Supreme Court ceased to exist, but under Article 16 of the Residence Convention between the Allied Powers and Turkey, in all matters of personal status as regards all non-Moslem nationals of the Allied Powers in Turkey the national tribunals established in the country of which the party whose personal status is in question is a national shall alone have jurisdiction, and the Treaty of Peace (Turkey) Act, 1924, and Article 2 of the Treaty of Peace (Turkey) Order made thereunder provide that His Majesty's Supreme Court of Judicature in England and the Supreme Court in Cyprus shall exercise the jurisdiction over British subjects which is reserved for their national courts under the Residence Convention.

18. *In re Cunningham. Healing v. Webb*. 1924 1 Ch. 68 (Eve J.).

The question in this case was whether a will should be interpreted according to English or French law. The testator was a British subject and died in France, domiciled there. The will was in English form, the sole executor was English. The named beneficiaries were all English, except certain servants of the testator in France, and the bulk of the property was in England. Eve J. held that the will must *prima facie* be construed according to French law since the testator died domiciled in France, unless there was sufficient evidence of an intention on the part of the testator to exclude the operation of the rule: in *Bradford v. Young* (29 Ch.D. 617) the Court of Appeal had said that if it could be ascertained either by direct statement in the will or by a combination of circumstances that the testator intended to exclude the operation of the rule, the Court would give effect to that intention. The learned judge held that in this case no such combination of circumstances existed and followed *Anstruther v. Chalmers* (2 Sim. 1) in which, in spite of the fact that the testator was Scotch, made his will in Scotland and in Scotch form containing many expressions peculiar to Scotch law, it was held that the will must be interpreted according to English law, the law of the domicile.

The exception to Rule 196 in Dicey's *Conflict of Laws* and the comment on that rule is, therefore, in view of this decision too widely stated and inaccurate.

19. *Rosler v. Hilbery*. 1925 1 Ch. 250. C.A. (Russell J.).

By Order XI, rule 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever . . . (f) any injunction is sought as to anything to be done within the jurisdiction . . . or (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

A company established in Belgium was, owing to a preponderance of enemy interests therein, ordered by the Belgian Court to be wound up, and a sequestrator, the defendant C., was appointed to collect the assets, to satisfy the creditors, and if there were any surplus assets to distribute them among the members of the company in accordance with their rights. A company in England, which was being wound up under the Trading with the Enemy Act, was found to owe the Belgian company a sum of £22,500. Under an order of the Court made in the winding up this sum was, at the request of the defendant C., paid to the defendant H., a solicitor in London, who, in view of claims made by the three Plaintiffs, gave an undertaking not to part with it until further order. An action was then commenced by the three plaintiffs, who were members of the Belgian company, all aliens and resident abroad, against the defendants, C. and H., claiming an injunction to restrain the defendant H. from parting with £22,500, which was described as representing moneys belonging to the persons who formerly constituted the Belgian company, an inquiry as to how much thereof was due and payable to the plaintiffs respectively, and an order on the defendant

H. to pay such amounts to the plaintiffs respectively. An order was subsequently obtained by the plaintiffs *ex parte* giving them liberty to serve a notice of the writ of summons out of the jurisdiction on the defendant C. at Antwerp. On an application by the defendant C. to discharge the order :

Held (by Russell J. and the Court of Appeal) that the *forum conveniens* was the Belgian and not the English Court, and that the order for substituted service must therefore be discharged and the service of the notice of the writ on the defendant C. set aside. The Master of the Rolls said : " If regard is to be had to the *forum conveniens* I can imagine no forum less convenient than the Court of this country, because what will have to be decided is what is the sum to which three foreigners, none of whom is resident in this country, are entitled in the ultimate winding up and distribution to be made of a Belgian société en commandite, which has been in the hands of a Belgian resident in Antwerp for a considerable number of years. That will have to be decided according to Belgian law, and it seems to me quite impossible to suggest that the Court of this country would be a suitable forum in which to determine the rights of the plaintiffs."

Held also by the Court of Appeal (Russell J. expressing no decided opinion on the point) :

1. That having regard to the undertaking given by the defendant H. the injunction was not really part of the relief sought and was wholly unnecessary, and was asked for only to found the jurisdiction of the Court to make an order for substituted service, and accordingly that the substance of the case did not fall within sub-rule (f) of Rule 1 of Order XI. Sargent L.J. said : " As regards sub-rule (f), I think that what is there contemplated is an action where an injunction is part of the substantive relief claimed."

(2) That the primary defendant was the defendant C. and not the defendant H., who was only a subordinate and secondary defendant, and that the case therefore did not fall within sub-rule (g) of Rule 1 of Order XI. The Master of the Rolls said : " With regard to sub-rule (g) I have already said I do not think that M. Georges Caroly is a necessary or proper party to this action, because the position is really inverted. The action ought properly to have been brought against M. Georges Caroly, and it may be that Mr. Hilbery would then have been a necessary or proper party to be brought into the action in order that he might have the authority of the Court in any judgment given which would be binding upon him to obey."

E.

AUSTRALIA. SUPREME COURT, N.S.W.

Justus Scharf Ltd. v. Hagen.

Article 297 of the Treaty of Versailles, 1919.

The case of *Justus Scharf & Co. v. Hagen* (1922) 22 S.R. (N.S.W.) 612 raised a question turning on the interpretation of Article 297 of the Treaty of Versailles, 1919, which, so far as the writer can ascertain, is novel in a British court.

The facts were as follows :

Under contract made in New South Wales before the Great War, Nicholas Hagen, a French national resident in the French colony and dependency of New Caledonia, became indebted to the amount of £12,925 7s. 3d. to Messrs. Justus Scharf & Company, a company incorporated according to the law of New South Wales and carrying on business in Sydney. During the war the French authorities in New Caledonia formed the opinion that the company was under the control of Germans resident in Germany and hence that the debt due to it by Hagen constituted a debt due by a French national to an " enemy " firm, within the meaning of French war legislation, in virtue whereof the French Court at Noumea ordered Hagen to pay the debt (as he in fact did) to a sequestrator appointed by the Court, and the debt was thereby transferred to and assigned to the French Republic.

In New South Wales, however, no steps under British war legislation were taken by the Australian authorities against the creditor company, which, therefore, at all material dates retained its character as a British limited company. Before the date of the French order the Company went into voluntary liquidation, the liquidator being a British subject resident in Sydney.

After making payment to the French Treasury, the debtor came to Sydney during the war on a visit, and was compelled to find security for the debt, for the recovery of which the creditor firm brought an action against him in the Supreme Court of New South Wales, the writ being served upon him while thus temporarily resident within the jurisdiction. The suit was heard after the conclusion of peace.

To the declaration the defendant pleaded that the plaintiff company was controlled by Germans and that he was protected by the Treaty of Versailles (Article 297) from having to pay the debt to the plaintiff company. The plaintiff demurred and also replied that the company was in voluntary liquidation and under the control of the liquidator, who was an Englishman, at the time the sequestration order was made by the French authorities.

The arguments for the respective parties were as follows :

(1) The plaintiff contended (a) the pleas disclosed no matters preventing the Court from applying the ordinary law as between an Australian company and its debtor who, though a foreigner, was within the state when action was brought. The (Federal) *Treaty of Peace Act, 1919*, and Regulations of January 28, 1920, made thereunder, which make ss. 3 to 7 of Part X of the treaty operative in the Commonwealth, do not apply to the present case.

In particular Article 297 (b) has no application because according to the pleadings there were no property, rights or interests belonging to German *nationals*, and the company was not controlled by Germans when the treaty came into force, being under voluntary liquidation by a British subject.

Nor did Article 297 (d) apply since that sub-section made all exceptional war-measures, &c. final as between Allied and Associated Powers and Germany and their respective nationals, yet without specifically including "companies controlled by Germans". An Australian company controlled by Germans was not a German "national", but, according to the definition in the Treaty of Peace Regulations, was a British "national".

Moreover the debt due by the defendant to the plaintiff was a right or interest in Australia (not in New Caledonia).

(2) The defendant argued (a) that the debt was a right or interest in New Caledonia (citing *inter alia*, *Commissioner of Stamps v. Hope* (1891) A.C. 476 at 481 and *Favorke v. Steinkoff* (1922) 1 Ch. 174 ; (b) that the company was still controlled by Germans since the appointment of a liquidator does not take away the control of the shareholders (in re *Anglo-Moravian Hungarian Junction Railway Co.* 1 Ch. C. 130 at 133-4 and *The Hamborn* (1919) A.C. 993 at 997) ; and (d) that Article 297 (d) applied to the present case, since no argument could be founded on the mere absence of the words "or companies controlled by them" when the effective words in the sub-section were to make the war measures binding upon all persons, its general operation being sufficiently indicated by the remainder of that Article and the annex thereto. See *The Blonde* (1922) 1 A.C. 331 at 325.

The Full Court *per Cullen C.J.* held that the plea was good and that the

plaintiff company was debarred by the Peace Treaty from bringing the action and that the replication was bad.

As to the meaning of Article 297 (d) the Court, adopting the canon of construction stated by Lord Sumner in *The Blonde* (*cit. sup.*), considered the intentions indicated by the general tenor of these economic clauses to be clear. "I think it plain that the exceptional war measures or measures of transfer, being measures dealing with rights and obligations which subsisted between Allied and Associated nationals on the one hand and German nationals on the other, cannot be drawn into question by any person whatsoever except as regards the reservations laid down in the Treaty. In so far as those measures and acts done or to be done in execution of them, may affect rights and obligations subsisting between nationals of the Allied and Associated Powers *inter se*, clause (d) does not prevent such nationals complaining that by error or otherwise one of such nationals has in effect been allowed an undue advantage over the other. By what means such a complaint might be investigated and dealt with it is not necessary now to consider. It seems to me to be clear, however, that once a debt, owing to a German national by a national of an Allied and Associated Power has been liquidated in pursuance of such measures, that debt by virtue of this article ceases to exist. . . . Assuming that in the present case the plaintiff company, though a British national, is on no better footing than a German national since it was and continues under German control, then taking the fact to be as set out in the second plea that the whole debt has been completely liquidated through the action of the French authorities in New Caledonia, I think it is clear that this action cannot lie."

On the assumption that the liquidation was incomplete His Lordship held that the locus of the debt if unpaid was in New Caledonia, following the principle formulated in Dicey's *Conflict of Laws*, 3rd ed. 342, that debts are to be deemed to be "situate in the country where they are properly recoverable or can be recovered." And this notwithstanding the debtor's presence in New South Wales when action was commenced.

"There still", he added, "remains the question in regard to both pleas whether a British company under German control comes within the purview of Article 297 (d) at all. I think the answer must be found in the context supplied by other clauses of the Treaty. Of what use, for instance, would it have been to the Allied and Associated Powers if this were not so, that they should reserve under clause (b) the right to retain and liquidate the property, rights and interests belonging at the coming into force of the Treaty to companies controlled by German nationals? The reason for this is manifest. A corporation constituted by the laws of one of the Allied nations and operating within its territory, but under the control of enemy nationals, was even a more patent destructive agency in the hands of the enemy than would be an open and acknowledged national or agent of the enemy within the territory. The preservation of the right to retain and liquidate the property of such a corporation after the war ended necessarily implies that that right when once effectually asserted cannot reside anywhere else. It would be in the last degree absurd to attribute to the high contracting parties the intention to leave any debtor exposed to the conflicting claims of two different agencies for the collection of the same debt or that he should incur a liability to pay the same debt twice over. Furthermore it is not without significance that in the second paragraph of clause

(b) the words 'the German owner' are used as an equivalent description to that contained in the first paragraph which included both German nationals and companies controlled by them. For these reasons it seems to me that to rely upon the absence from clause (d) of the words 'or companies controlled by them' after the words 'German nationals' while they are present in clause (b) would be, in the language of Lord Sumner in the case of *The Blonde*: 'to emphasize the absence of express words where the sense to be implied from the purport of the convention is reasonably plain.'

"For these reasons, in my opinion, judgment must be given for the defendant on the demurrer to the pleas . . ."

The Court also held for the reasons adduced by the defendant, that voluntary liquidation did not alter the British character of the company, which, by concession, was under German control.

A. H. CHARTERIS.

FRANCE—CIVIL TRIBUNAL OF THE SEINE

THE "JOYSTICK" PATENTS.

Jurisdiction over breaches of patents committed at the instance of a foreign Government—Exterritoriality of an allied belligerent army.

The French owner of the "joystick" patent instituted proceedings in France against several English manufacturers of aeroplanes who had constructed or repaired for the British army machines operated by a control lever or "joystick" alleged to be in breach of the plaintiff's patents, the machines being subsequently brought to France for use by the British forces during the war.

Held: that the suits must be dismissed as not within the jurisdiction of the Tribunal.

From 1911 up till 1923 M. Esnault Pelterie, the owner of certain patents relating to the stability control of aeroplanes, was engaged in protracted litigation against several French aircraft construction firms. By judgments of the Court of Appeal in Paris in 1923 various decisions of the lower courts were confirmed in which it had been held that Pelterie's patents were master patents covering the joystick or control lever having universally jointed instinctive action and that the patents were valid and had been infringed. Substantial damages were awarded against the aircraft construction firms and also against the French Government who had become concerned in the proceedings in respect of the user of his inventions in aeroplanes constructed and used during the war.

Proceedings were then instituted in the French courts against the British firms which had constructed and delivered aeroplanes fitted with similar appliances to the British Government. It was alleged that the contractors had manufactured or caused to be manufactured, repaired or caused to be repaired, and had sold or delivered to the British Government, or for the account of the British Government, aeroplanes or parts of aeroplanes constituting infringement of the patents referred to; that they had permitted the British Government to introduce, conceal or employ the said apparatus, or parts of apparatus on French territory, either during hostilities or at some subsequent date; and that they were responsible for the said acts of infringement, introduction and employment: That their acts had involved the plaintiff in grave prejudice for

which they owed him compensation, and the acts having been committed both in France and abroad, compensation was due both under the French and English patents.

The cases came before the Third Chamber of the Civil Tribunal of the Seine on the 4th, 11th, 18th and 30th March, 1925, on the preliminary question whether or not, in view of the position of the defendants under British Patent Law as Contractors to His Majesty's Government and of the extraterritorial position of the British Army in France, French Courts were competent to deal with the claims.

Counsel for the plaintiff discussed the position of Contractors to the British Crown under British Law in regard to patents, and suggested that that law did not restrain a patentee from claiming compensation from Contractors. He pointed out that the various contracts under which the aeroplanes in question had been manufactured contained clauses in varying terms by which the Contractors undertook to indemnify His Majesty's Government against claims in respect of infringement of patents. In regard to French Law, counsel argued that in presenting drawings and models, and in soliciting and carrying out orders for aeroplanes which the constructors were fully aware were to be introduced into France and in doing this for their personal gain, they committed acts for which they could be held personally responsible, and referred to Articles 14 and 1382 of the Code Civil, and the French Law of 1844. He emphasized that the proceedings were against contracting firms and not against the British Government, and argued that there was no justification for the suggestion that the proceedings though in form against contractors, were in fact and in intent against the British Government. He further alleged that the principle of extraterritoriality applied only to the persons of diplomatic agents and could not be applied to the Allied armies in France until a formal convention to that effect could be shown to have been concluded between the states concerned.

Counsel for the defendants sought to make clear to the Court the real position in English Law in regard to the use of patented inventions by the British Government, its agents and contractors, and quoted the cases of *Pyrene Co. Ltd. v. Webb Lamp Co.* (37 R.P.C. 57), and *In Re Hale's Patent* (1920, 2 Ch. 377). He contended that in bringing proceedings against the British constructors, the plaintiff was really taking action against the British Government, that according to International Law no action could be brought against any foreign Government, and that the plaintiff's claims could only be settled in England in accordance with British Law. The aeroplanes were constructed in England for the British Government, and the Crown alone was responsible. In so far as the aeroplanes had been introduced into France by the Contractors, they had acted in the matter as the agents of the British Government, and the British Government alone could be responsible. The question of the infringement of the French patents did not arise as the aircraft were introduced by and on behalf of the British Army, which army was quartered in French territory and remained in pursuance of International Law subject only to British Law.

It was also argued that such an action had never been heard of before : that patents in each country represented a special law with territorial limitation and that the Courts of each country are competent to deal only with infringements of their own Patent Laws. A French Court could never declare a British patent either valid or invalid.

At a hearing on March 30, the substitute on behalf of the French Government submitted his conclusions. He pointed out that the sole question before the Court was that of competency. That the claim related to the infringement of patents and could be solved by the principle of the territoriality of the patents. He reviewed the position under English Law, and accepted the certificate of the Air Ministry that the defendants in all they did had acted on behalf of and by the order of the British Government. He concluded that the Air Ministry itself had been responsible for the alleged exploitation of the invention through the intermediation of the Contractors, and that accordingly the French Court was incompetent, as in reality the action taken was against the British Government. As regards user in France, he submitted that the principle of sovereignty of nations and reciprocal independence of states prevented the user by the British Army from being the subject-matter of complaint in the French Courts.

The following judgment was delivered by the President of the Court on April 1, 1925 :

Whereas Esnault Pelterie is owner of three French patents relative to the stability of aeroplanes and involving the employment of a single lever known as the " joystick " (*manche à balai*) ;

Whereas the validity of these patents has been recognized by various decisions of the Court of Appeal of Paris of the 18th March, 17th May, and 26th July, 1923 ;

Whereas he is also owner of three British patents relative to the same invention, for which he made application in England in 1907 and 1908 ;

Whereas in the course of the war 1914-18, the British Government placed orders with various constructors, and in particular with the A. V. Roe Company with head office at Avro Works, Newton Heath (England) and with E. A. Vernon Roe, its director, for a certain number of aeroplanes specifying in the order that the said aeroplanes were to be equipped with the Esnault Pelterie " joystick " ; whereas the said machines were delivered by these firms to the British troops, either in England or in France ;

Whereas Esnault Pelterie, considering that these facts constituted an infringement of his patent rights, has summoned the said Company and its director before the Civil Court of the Seine, alleging against them the torts of infringement of patent, complicity and introduction into France of infringing apparatus, and certain faults (" fautes ") such as solicitation of orders, presentation of plans and models ;

Whereas the defendants allege that the claim brought against them concerns the British Government for which they were merely the agents and deny the competency of the French Courts, invoking the principle of International Law which prevents the Courts of one country entertaining proceedings brought against foreign Governments ;

Whereas in the case under consideration, both as regards the construction in England and all the facts which took place in England (whether it be a question of actual offence [" délit "] or simple act [" fait "]) English Law must be applied ; whereas in effect, Article 14 of the Civil Code, which permits of foreigners being brought before the French Courts, on account of their delicts or quasi-delicts committed to the prejudice of Frenchmen, even abroad, in no way modifies the rule in accordance with which the law of the country in which the acts complained of took place, is to be observed ;

Whereas, alone, the introduction into France, concerning facts which occurred in France, and constituting a distinct delict, must be governed by French Law ;

Whereas there is therefore no ground, as maintained by the applicant, to distinguish the acts of the public authority and those of the administration of the British Government ; whereas in effect, in accordance with a unanimous jurisprudence, the Courts are absolutely incompetent with respect to foreign Governments, no matter what the character of the acts performed by those Governments ;

Whereas, moreover, it is agreed that the British Government acted with a view to the public interest, and for the National defence of Great Britain ;

Whereas, according to the allegations of the applicant, the British Government was not a party to the action and the Court having to deal merely with an action against private individuals, cited as responsible for their personal acts, the exception of immunity of the British Government cannot be admitted ; whereas this objection is not justified and there is ground to uphold the incompetency of the French Courts ;

Whereas, in effect, the law of the reciprocal independence of states must be applied not only to claims directed against the Government itself, but also to claims against the agents, proxies or co-contracting parties of the Government, by reason of acts committed by them in this capacity or in pursuance of orders from the said state ;

Whereas it is not possible by circuitous means to render justiciable by a foreign Court the transactions of another state ;

(1) So far as concerns the actual facts of infringement and complicity, introduction, faults ;

Whereas by the terms of the British Law of 1907, known as the Patents and Designs Act, Chapter 29, when it is a question of the service of the state, every British Government Department is entitled (without need of obtaining the consent of the patentee) to use the invention for the service of the Crown either by itself, or by its agents or by its contractors or other persons ;

Whereas this right of expropriation is clearly shown in each of the British patents granted to the applicant, so that the said applicant has always known that the Government could use his invention, should the public interest come into question ;

Whereas it is in pursuance of this law that the British Air Ministry, instead of itself using the patent, accepted the offers made by the defendants, placed contracts with them, ordered the delivery of aeroplanes equipped with the " joystick ", in Great Britain, and in France ;

Whereas the Court being only called upon to deal with an exception of incompetence has not to settle the question whether if an offence or quasi-offence was committed the defendants must be held responsible ; but whereas, in order to settle the main point of the discussion the Court would have necessarily to examine under what conditions the British Government accepted the plans and drawings submitted to it ; under what conditions the said Government used the invention ; under what conditions it authorized the defendants to use the Esnault Pelterie system in construction, in repairs ; under what conditions, despite the Royal British Proclamation of August 3, 1914, prohibiting export, the British Government ordered constructors to export aircraft directly to the

British troops quartered in France ; under what conditions the British Government obtained the sanction of the French Government to make these importations, &c. ;

Whereas the Court would have also to examine the import of the various authorizations given by the British Government and whether the result of these was not to cancel the delictual character of the acts with which Esnault Pelterie charges the defendants ;

Whereas on each of these points the Court would have to discuss the decisions taken by the British Government ;

Whereas if there were infringement, introduction, faults, the British Authorities would be co-authors thereof ; whereas between the acts of the British Government and those of the defendants there is such a connexion, such a solidarity, that it is impossible to separate them ;

Whereas the conclusion to draw from these propositions is that all the acts charged against the defendants, both as regards those occurring in Great Britain and those occurring in France, were committed by them in virtue of a delegation from the British Government, in accordance with the orders and under the supervision of the said Government acting in its full sovereignty ; whereas these facts raise only questions of International Law, and on this ground are withdrawn from the consideration of the French Courts :

(2) With respect to the British method of settling the compensation due to a patentee whose patent has been made use of by the Government ; whereas the Patent Act of 1907 specifies that the conditions of such compensation shall be arranged by agreement between the Government Department and the Patentee, and, in default of agreement, by the competent authority, which, at the present time is the Royal Commission dealing with Awards to Inventors ; whereas by this law, whenever there is a dispute between Patentees and a Government Department, the Government reserves the prerogative themselves to make the best of their means of defence ;

Whereas it would indirectly constitute a serious attack on the rights of the British Government to permit the adjustment of this compensation between the Patentee and the Constructors, without the intervention of the said Government ;

Whereas Esnault Pelterie has vainly argued that in certain contracts, and particularly in the British Air Service type of contract, there is provision for reciprocal guarantees between the State and the Manufacturers ;

Whereas every action in guarantee presumes the pre-existence of a principal action, which principal action can only be dealt with in the presence of the British Government ;

Whereas from this second point of view, the application is still non-admissible ;

Whereas Esnault Pelterie has clearly had in view the British Government since we find in his documents the following passages ; “ The Defendants have constructed, repaired or caused to be repaired, sold to the British Government, or on behalf of the British Government. . . . ” “ They permitted this Government to introduce, receive, employ, &c.” . . . “ They committed the initial fault of presenting to the British Government plans, designs, &c.” . . . “ They solicited orders from the Crown, permitted the Crown to place orders for infringing devices with other Constructors ”. . . . “ The Claimant can take action both

against the British Government and against the Constructor". . . . "The Claimant finds himself obliged in so far as concerns the British Government, &c. . . .";

Whereas in addition to his suit before the French Courts, Esnault Pelterie in May 1923 lodged a claim against the British Government, with the Commission dealing with Awards to Inventors, taking good care not to summon the constructors before the British Courts ;

Whereas in this petition he pleads the loss which he has suffered on account of the aeroplanes constructed in England but used by H.M. Forces either in England or abroad so that if judgment were given in his favour as regards these claims the defendant would receive double compensation for each apparatus ;

Whereas the applicant wrongfully alleges that the British claim, which he has not abandoned, does not refer to those of the aircraft which went to France ; whereas in his petition he asks for compensation for all the aeroplanes constructed in England, no matter what their destination on leaving the factory ;

Whereas it is not necessary to dwell upon the other arguments brought forward by Esnault Pelterie, in particular those which he claims to draw from paragraph 2 of the Patent Act of 1919 and from the Indemnity Act of 1920, as these arguments bear upon the dispute itself and not upon competency ;

Whereas, in effect, even though it might be established that in certain special cases patentees might have an action directly against constructors, it would not follow that the present process is not an attack on the independence of a foreign Government.

For these reasons.

Joinder of the cases.

Declare the applicant's claim not competent ; dismiss the claim and condemn him to pay costs.

An appeal lodged by M. Esnault Pelterie against this decision was subsequently withdrawn, general terms of settlement having been reached between him and the British Government.

REVIEWS OF BOOKS

Traité de Droit international public. By Paul Fauchille. Tome I. deuxième partie ; *paix*. Paris, Librairie Arthur Rousseau. 1925. xii and 1182 pp. (85 francs).

It is only when a comparison is made between the last edition of the *Manuel* of the late Professor Bonfils, which was edited by M. Fauchille in 1914 and on which this work is based, and the present volume that the claim which the author makes for his work to be considered "réellement comme notre œuvre personnelle" can justly be appreciated. This volume contains more than ten times the number of pages devoted to the same topics in the *Manuel*, and the high standard of the two previous volumes is maintained.¹ The bibliography continues to be an important feature of the work and affords some slight indication of the great labour which its preparation has entailed. A Table of Contents and an Index increase the usefulness of the book.

The present volume deals in Book I with the territory of states, sea, land, water and air, together with the modes of acquisition and alienation, including the indirect or disguised methods, such as pledge, lease and protectorate.

There is a lengthy discussion on territorial waters, and M. Fauchille, discussing various reasons for their maintenance, such as ownership, sovereignty and self-protection, recognizes that by the rules of positive International Law the sovereignty of states over their adjacent territorial waters is generally admitted. On the vexed question of the extent of these waters, conflicting views are examined, and a settlement by collective international agreements is suggested, but the time does not appear ripe for the steps to be taken for this.

The section on Straits and International Canals contains the latest international developments, including the Treaty of Lausanne and the Straits Convention. In discussing these the author deals with the difficulties raised by Russia and Turkey in reaching an agreement. The history of the making of the Panama Canal and of the treaties relating thereto is very full.

One of the most valuable chapters, which marks the progress which International Law has made since the establishment of the League of Nations, is that dealing with international rivers, and the legal position of some thirty rivers in Europe and America is set forth. Another example of the author's treatment of modern developments is the chapter on Mandates, to which seventy pages are devoted. His examination of the practice of plebiscites in relation to the claims of "self-determination" is thorough and interesting.

Ships and Aircraft, which are governed in some respects by the principles applied to sea-going craft, are dealt with in Book II. On the law of the air M. Fauchille was a pioneer, and his treatment of aircraft and aerial navigation is detailed. The discussion of the position of vessels owned or chartered by states and operated for commercial purposes, discloses the diversity of treatment which such vessels receive in different states. M. Fauchille would not

¹ For previous reviews in the *Year Book* see vols. for 1920-1, p. 109, and 1923-4, p. 152.

extend immunities to such vessels unless their commercial enterprises are for the needs of the national defence, a view largely held in commercial circles.

A fact which strikes a reader of this volume is the difficulty which exists in laying down a definite rule of International Law of universal application on any one of the various topics discussed. There will be found to exist a preponderating weight of evidence in favour of a rule in the majority of the problems discussed, showing the existence of what the late Professor Oppenheim called "General" International Law, but there will also be found in many cases noteworthy evidence of contrary usage. M. Fauchille in such cases seldom leaves them without proposing the solution which appears to him to be best suited to a scientific settlement of the matter.

One adverse criticism must be made in concluding a review of a valuable contribution to the literature of International Law; it is deplorable that the paper on which it is printed is wholly unworthy of the contents of the book.

A. PEARCE HIGGINS.

When the foregoing was written the writer was not aware of the melancholy fact that M. Fauchille, who had been in poor health for some time, had passed away on February 9, 1926, within two days of completing his 68th year. M. Fauchille had, however, the satisfaction of being able to complete the third and last part of Volume I of his great work *Le Traité de Droit international public* which has since been published. M. Fauchille's monument is to be found in this remarkable work, the most comprehensive on the subject which has been published since the termination of the late war. It is to be feared that the great strain involved in its preparation was, in a measure, responsible for the final breakdown in his health. Besides being one of the founders and editors of *La Revue générale de Droit international public* from 1894 till his death, he was also one of the founders, if indeed he may not be called the founder of *L'Institut des Hautes Études internationales* in 1920. He was also mainly responsible, with the assistance of distinguished French and Belgian publicists for two important publications relating to the late war, namely, *La Guerre de 1914—Recueil de Documents intéressant le Droit international* begun in 1916, and collections of the Prize Cases decided by the Prize Courts of Great Britain, France, Italy and Germany.

A. P. H.

Cases in Vice-Admiralty and Admiralty, New York, 1715-88, edited by C. M. Hough, LL.D., U.S. Circuit Judge. pp. xxxvi + 311, Humphrey Milford. (23s.)

This volume contains reports of such cases as are disclosed by the records of the Vice-Admiralty Court of New York and the Admiralty Court of the State of New York. These records have lain upon the files of the United States District Court in New York City since its organization in 1789. The volume forms part of the Yale Historical Publications and its issue has been rendered possible by the generosity of a number of members of the bar of New York City.

Some two hundred cases are included in the volume, but in many of them it is only a point of practice which is determined. Only in time of war did the Vice-Admiralty Court at New York become at all active. The first twenty-seven pages of the volume comprise only revenue or instance cases, and cover

a period of thirty years. From 1744 till 1763 Great Britain was at war and most of the reported cases are prize cases. From 1774 to 1784 there is a break in the records, and during this interval occurred the Declaration of Independence. Thereafter the records become more meagre and only a few intelligible reports of cases, all on the instance side, can be compiled.

It is the prize cases which form the most interesting part of the volume. They show prize law in the making and suggest that the somewhat rigid and artificial rules which are so prominent in the days of Lord Stowell are not an essential part of the system.

An introduction affords some useful information on what appears to have been the practice of the Court and some most interesting details of the successive judges of the Court and of the more prominent lawyers who practised before them. A note on p. 257 shows what scanty records remain of the old Vice-Admiralty courts in other States.

The volume is charmingly got up and its preparation has clearly been a labour of love on the part of Judge Hough.

C.

Note by Professor J. L. Brierly, D.C.L., Chichele Professor of International Law and Diplomacy in the University of Oxford.

Some of the decisions of the Vice-Admiralty Court of New York during the war of 1756, now printed for the first time in the volume referred to above, suggest that the colonial court, though apparently not at all closely in touch with English practice, was feeling its way to a principle of prize law, which, if the development had not been arrested by the colonies becoming independent, would have been not very different from that afterwards enunciated by Lord Stowell, e. g. in *The Immanuel* (2 C. Rob. 186). There has been a tendency to regard the so-called rule of the war of 1756 as one which English courts invented and applied merely because it suited English interests; this is certainly an unfair criticism; see e. g. the note on p. 762 of Professor Pearce Higgins's 8th edition of *Hall's International Law*, which shows how widely the rule is recognized. But if it is true that when the American colonies were belligerent their courts applied a principle very like that which they so resented when applied later against themselves as independent neutrals, the fact, besides being of some historical interest, is relevant to the suggestion that the rule is merely arbitrary. The interest of Americans changed with Independence, and there was never again an occasion when the intrinsic reasonableness of the rule was likely to appeal to them.

The Court had constantly to consider whether a ship ostensibly of neutral ownership was not in fact a French-owned ship in disguise, and it regarded the fact of a ship being permitted to engage in the French colonial trade as raising a presumption that she was French; e. g. "As She is Thus Intituled To all The Priviledges of a French Bottom, and would have free admittance in The French Ports I incline To consider her as Such and Do Therefore adjudge and condemn &c." (the *Sancta Maria*, 1758, p. 94); "This ship was Laden at Dunkirk, a French Port; Part of her Cargo Purchased at Bordeaux, another French port, and furnished with the French King's Passport, obliging of them to export the Manufactures of France to the French Islands; and to bring back the Produce

of their Islands to some port in France ; so that all the papers they are Possessed off to prove she was Dutch Property and Destined to a Dutch Island is manifest Colouring " (the *Dagerved*, 1758, p. 140); " This circumstance of her not proceeding to the port for which she was cleared, but to a french port, together with the known practices of the Dutch during the present war, of Employing their ships in the service of the french, shews that her papers were Colourable ; and that lays the foundation for presuming that the french are Interested in the voyage " (the *Gloujande Star*, 1758, p. 146).

But was this presumption rebuttable ? For it is clear that if it was not, it would lead to exactly the same results as the fully-fledged rule of the war of 1756. Possibly the Court itself was not very clear about the point, or, as I think more probable, its view was steadily hardening in the direction of treating the presumption as irrebuttable. There are certainly cases in which it is implied that the owners may rebut it if they can ; e. g. " since by the french Laws of Trade no foreigner can maintain a Traffic with their colonies, it must be supposed that the true proprietors of the ship and Lading in Question are frenchmen ; " and as the ship's documents did not " take off " this and other presumptions, she was condemned (the *Isaac Gally*, 1758, p. 159). On the other hand in the *Vryheid* (1758, p. 138) the judge, after discussing various evidence of " colouring " and being evidently very doubtful of the Dutch ownership, decided against the ship on the ground of her holding a passport from the French King ; " as she is by that Passport Intituled to all the priviledges of a French Bottom,— I shall consider her as such." He used practically the same words in the *Peter* (1759, p. 168) ; and he condemned the *Gedultigheydt* (1761, p. 188) because she " was laden with the produce of the Island of Hispaniola at Capo Francois," and, so far as appears, without any evidence that her Dutch papers were false. The *Pearle* (1761, p. 186) is perhaps the clearest case. It contains an interesting account of the successive devices of the Dutch " as carriers of the french effects during the war," and the way in which they were countered one after another ; and goes on to state that in the end we had " made it a rule to take all vessels that come loaded out of a french port, and condem them as Lawfull prize, but that does not Effectually answer the end or Intirely prevent our good friends the dutch from assisting our Enemies." It is significant that here there is apparently no question of " colouring " ; the Court seems ready to condemn a genuinely Dutch ship solely for assisting the enemy by engaging in the closed trade. A new judge came into office in 1762, and seems to have returned to the idea of a merely rebuttable presumption ; " All trade with foreigners in the french plantations for their produce being prohibited by severe penalties, and it being the practice of the Enemy to Conceal their property under the Names of Subjects of Neutrall or friendly States and particularly the Dutch, It seems to be a Very Natural and Strong presumption that all Vessels and Goods coming out of the french ports do Belong to french Subjects. Therefore to warrant the Release of them when Lybelled as prize, the Evidence of the property in the Subjects of States not at war with us Ought to be Very fair and Consistant."

J. L. B.

Recent Developments in International Law. By Professor Garner. Published by the University of Calcutta. xii + 840 pp. (30s.)

This volume consists of the lectures given by Professor Garner at Calcutta in 1922 during his tenure of the Tagore Professorship in Calcutta University. The volume comprises fifteen lectures. Most of them deal with the development which international law has undergone since the beginning of the twentieth century.

More than half the book is taken up with the laws of war. As the author himself says in his preface, it is in the domain of war that the most rapid growth of international law has taken place. This was inevitable during a great struggle such as the war of 1914-18. The development of the rules relating to the peace time relations of states can proceed without interruption, but it is only in time of war that the laws of war can develop. The rules of war at the moment of the outbreak of one struggle must be founded on the practice and experience of the past wars, and it is only when a new war has begun that it is possible to judge how far the developments of science and the changes of commercial practice entail corresponding modification in the rules which belligerents may enforce. It is not only of naval war that this is true, though it is in that field that the exercise of the fundamental rights of a belligerent has needed most adjustment to modern conditions.

The changes which international law has undergone are surveyed by Professor Garner in these lectures under such headings as the development of conventional law—such as The Hague Conventions—of the laws of maritime warfare, or aerial law, of the application of international law in the world war and in the treaties of peace, the progress of agencies for the peaceful settlement of disputes, the League of Nations and the Permanent Court of International Justice.

The opening and the closing lectures—the former covering the modern outlook on international law and the latter the points of doubt and difficulty which must be cleared up and the lines on which we may look for progress and amelioration—are both admirable. The notes to them contain a wealth of knowledge.

The whole series of lectures must have been inspiring to attend and to hear. One can only regret that the time which elapsed between the delivery of the lectures and their publication has rendered them in some respects a little out of date. Even three years have seen a change in the view-point of international lawyers. This is not said to detract from the value of the volume but only to voice one's regret that the volume was not given to the public at an earlier date.

C.

Folkeretten i Fredstid og Krigstid af Axel Muller, Dr. jur., Professor ved Kjöbenhavns Universitet. G. E. C. Gad's Forlag, Copenhagen. 1925. 332 pp.

This work is of great importance to everybody interested in matters of international law. The first volume, now published, shows the author's plan to give a complete and systematic development of the subject. Judging by the clear and distinct classification of the topics contained in the volume now produced, it may be anticipated that the work—though of moderate size—will

prove to be a useful compendium, in which will be easily found any question relating to international law.

The author gives on summary lines an embodiment of the international law problems, stating shortly from time to time his personal views on doubtful questions. The reader—from the student to the scientific man—will in a general way find satisfactory information on the outlines of the matter and on the questions in which he may be particularly interested.

Besides the general merit of the work, two things confer on it a special value.

Firstly, the author has completed a useful work in dealing with the matters quite up-to-date. Even the Locarno papers are reproduced. The science of international law, already so extensive before the war, has grown up since like a wild forest where track and path hardly can be found. All this copious material has been dealt with by Dr. Möller as a part of a systematic whole, and this book, which may probably claim priority in having systematized the matter up to 1926, can be considered for years to come as a standard reference work.

Secondly, this may be the case on account of the unusually great number of references. So to say with every question mentioned are connected numerous references to literature, legislation, law treatises, so that it may be practically affirmed that even the smallest pamphlet has been referred to, and a searching or even intense study would probably give only a small chance of discovering omissions or errors. The author has resisted using current phrases like "it is stated," "it is known," without adding precise references, and he has thus increased the value of his work.

In a short but substantial introduction the author looks upon the future of International Law. He seems rather pessimistic, especially on account of the failure of instruments of authority to enforce justice between nations. In that respect he may, as many others, take too short a view. The transformation of international relations must be very gradual. Furthermore, he appears not to count much upon the undoubted movement towards disarmament, which must, however, bear as a consequence the final result of peaceful settlement. On the other hand Dr. Möller appears to put his faith more upon the establishment in Europe of federated states. It seems, however, that an association of such different units is impossible for centuries to come. More useful would certainly be the partition of the existing states into small federative parts. If such division might produce a certain decline in intellectual matters, which seem closely connected with the large states organized upon a unitary basis, it might nevertheless be more helpful to the cause of peace.

Dr. Möller's work, which is written on British principles, ought to have a speedy translation into English. This would be comparatively easy as most of the very large number of references might be reprinted without translation.

D. NYHOLM.

The Permanent Court of International Justice, Its Constitution, Procedure and Work. By Alexander P. Fachiri. Oxford University Press. vi + 342 pp. (15s. net.)

Mr. Fachiri says in his preface that he has written this book with two classes of readers in view: First, the lawyers and others who may be professionally concerned in cases before the Permanent Court; second, that section of the

public which is interested in international affairs and the League of Nations. He has laid both classes under a deep obligation—an obligation they will certainly discharge by the reception they give to his admirable work. He apparently forgot a third class, the ordinary students of international law, for whom notwithstanding he has provided an indispensable text-book which they greatly needed and which they will not be slow to use.

Mr. Fachiri has followed throughout the method of expounding and commenting the important documents—the Covenant, the Statute of the Court, the Rules of Court, &c.—which he reproduces in his Appendix. At first sight it may seem a pedestrian method, but it will not seem so to those who read him with care and who find how much of value he has to say, not only on broad questions concerning the composition or jurisdiction of the Court, but even on such seemingly minor points of procedure as the taking of evidence before the Court, the right of intervention by third parties, the allocation of parties' costs, or the revision of a judgment rendered. It is precisely his method which will make what he has written of practical value to those who are professionally concerned with the work of the Court, while—even more important from a general point of view—it is exactly the method which is now urgently required in the study of present-day international law. His success in its use is enhanced by the skill with which he introduces concrete illustrations—his account of the first election of the Court is example enough.

His six chapters deal successively with the creation of the Court, with its Organization, its Jurisdiction, its Procedure, its Work and its Relations with the League. All the chapters are adequate but the two most important are undoubtedly the third and fifth—Jurisdiction and Work. As he says, the jurisdiction of the Court is "the central and vital point in its constitution" and what he has written on the subject is—as it ought to be—carefully and cautiously expressed. He leaves some large matters almost undiscussed; he barely comments, for example, on the definition of "justiciable" disputes given in Article 13 of the Covenant and paragraph 2 of Article 36 of the Statute of the Court; he might usefully have said more about the "general principles of law" which under paragraph 3 of Article 38 of its Statute the Court is to apply. But on most important points he is very profitable, especially perhaps in his demonstration of the strictly judicial character of the Court in every branch of its work, in his discussion of the function of the Court in building up by its judgments the "jurisprudence" of international law, in his penetrating remarks on the "quasi-compulsory" character of arbitration and judicial settlement under Articles 13 and 14 of the Covenant, and in all that he has to say concerning the power of the Court to give Advisory Opinions. A great part of his book is rightly given to Advisory Opinions, which he shows again to be strictly judicial in character, equally valid as precedents with judgments proper, and a useful disguise for real litigation (the Court even allowing the same procedure as in regular disputes); and he further shows how they are "capable of being used as a not ineffective substitute for direct compulsory jurisdiction."

On only one point concerning Advisory Opinions he seems to the present reviewer unconvincing. He holds that questions in dispute before the Council of the League cannot be referred to the Court for Advisory Opinion without the consent of the parties, but his argument for this controversial view is incomplete and by no means conclusive.

His chapter on the first twelve questions dealt with by the Court is extremely interesting and he has shown discrimination in bringing out the points of general importance in the judgments and opinions so far rendered. Some critics may think that this chapter would be improved by an account of the views of dissenting judges in majority decisions, but none can read it, and particularly the account of the Tunis Nationality, s.s. *Wimbledon*, German Settlers, and Mavrommatis cases, without feeling the wide scope of the work which the Court has done and its importance in interpreting such constitutional documents as the Covenant, the Minorities Treaties, and the mandates, and without gaining the conviction that a jurisprudence of international law is already being built up.

Mr. Fachiri's last chapter is less satisfying than the rest. He overstates the independence of the Court from the League, and the very last sentence of his book, on the subject of sanctions, would seem to require rewriting in the light of the obligatory force of paragraph 1 of Article 17 of the Covenant. The Appendix also would be improved by the inclusion of the Report of the Jurists' Committee which drafted the Statute of the Court, for that Report is a document of much historical importance. But these are small shortcomings in so notable a contribution to the literature of the new international law, in the writing of which Mr. Fachiri has among British writers led the way.

P. J. N. B.

Le Droit des Prises de la Grande Guerre. Jurisprudence de 1914 et des années suivantes en matière de prises maritimes. Par J. H. W. Verzijl, Professeur de Droit international à l'Université d'Utrecht. Leyden : Société d'Éditions H. W. Sijthoff ; 1924. pp. xv + 1497.

This is the most important work on Prize Law which has appeared since the conclusion of the late war. Published under the auspices of the "Institut intermédiaire international" at The Hague, it deals with some 1,400 decisions given by all the Prize Courts in the belligerent countries, except those given in Russia and Turkey which the author was unable to obtain. It is a notable undertaking and Dr. Verzijl may be congratulated on the manner in which he has executed it. The difficulties in collecting the decisions must have been very great as there are no official collections of all the cases in any country.

The plan the author has adopted can be seen from a sketch of the contents of the work which is divided into three parts. The first part deals with the jurisdiction and competence of Prize Courts and contains about 230 pages. Under this head the following topics are discussed: the organization of the various tribunals, their competence, not only in the matter of prize but as regards all questions connected with maritime seizures, such as damages, freight, trade with the enemy, prize money and prize bounty, violation of neutral waters, the law of prize applied by the Courts, the relation between international law and the law administered by Courts of Prize, procedure, right of enemies to appear, the effect of judgments. We may note that Great Britain appears to be the only state in which Prize Bounty exists and where Prize Money, though no longer awarded to individual captors, is divided amongst the naval forces. The second part is concerned with the material law of prize, the place of capture, the qualifications of the capturing vessels, the objects of capture in prize, the national character of ships and goods, rights of prize against enemies, reprisals,

days of grace, exemptions from capture, rights of prize against neutrals, contraband, hostile destination and continuous voyage, blockade, unneutral service, incorporation into enemy commerce, and rights of prize as against nationals and allies. By far the largest part of the work, some 930 pages, is devoted to these topics, but they constitute the substantive law of prize. The third part deals with the formalities of seizure, visit and search, deviation for search, resistance, destruction of ships and cargoes and recapture. There are three important annexes containing (1) a list of various belligerents with the date of outbreak of war; (2) a list of the principal regulations in force in the belligerent state governing maritime captures, and (3) a table of treaties applied, violated or cited and of decisions relied on as precedents. Though there is a detailed table of contents, there is unfortunately no subject-index. It is to be regretted that the author, who has taken so much trouble in all other directions to facilitate reference to the cases dealt with, did not put this finishing touch to his labours and provide what is an essential part of the apparatus of law books.

A critical examination of the contents of this work would far exceed the limits of a review; one or two topics only can be referred to. One of these is the law administered by the Prize Courts. There is an antithesis between the standpoint of the English Prize Courts and that of nearly every other state, in that the former has declared in the *Zamora* in unequivocal terms that, under the constitution of the court, the law it administers is international law and that no orders of the Executive are binding on it. An Act of Parliament would bind it, but hitherto no statute has been passed laying down the terms of the law to be administered. The standpoint of the German Prize Court, and of the majority of, if not of all other Prize Courts (with the probable exception of that of the United States) may be stated in the words of the decision in the German case of *The Zaanstroom*: "The Prize Courts are national tribunals. . . . From this it follows that the Courts have to judge according to the law prescribed by their state regardless of whether this law is in harmony with existing principles of International Law or not." Dr. Verzijl appears to think that the antithesis shown by the *Zamora* judgment was more specious than real, particularly as the English Prize Court held that the Reprisals Orders conformed to the law of nations. His comments on the *Hakan* and the *Alwina* suggest that he has not fully appreciated the effect of the judgment of the Privy Council. His further statement that the international law administered by the English Prize Court is for the most part purely English law cannot be allowed to pass without criticism. In the case of the *Hakan* the Court took infinite pains, by an examination of the Memoranda prepared for the Naval Conference of London in 1908-9, and by research in authoritative works of different nations, to ascertain the rule of international law governing the condemnation of ships for the carriage of contraband, and finally decided against it on principles more favourable to neutrals than the hard and fast mathematical rule laid down in Article 40 of the Declaration of London. It cannot be too frequently pointed out that the Privy Council in the *Zamora* judgment definitely informed the Executive that there was sitting in the capital of a state engaged in a life and death struggle an independent court constituted to administer the Law of Nations, and that any orders addressed to it, except in so far as they mitigated belligerent rights, would be adjudged illegal if they failed to conform to the rules of international

law, which rules it would ascertain, as courts of law always do in England, by hearing counsel and by their own researches.

There are other topics on which we should like to challenge the views of Dr. Verzijl, but this review has already exceeded the limits of space. Opinions will continue to differ as to many of the comments made by the author, but his work is one which every student of international law is bound to consult on matters relating to the work of the Prize Courts during the late war.

A. PEARCE HIGGINS.

Theorie und Praxis des Völkerrechts. Ein Grundriss zum akademischen Gebrauch und zum Selbststudium. Von Karl Strupp. 1925. Berlin: Otto Liebmann. xii + 206 pp. (Mk. 7.50.)

In this guide to the literature of International Law Dr. Strupp has generally limited his references to the recent literature of the subject, with the idea that references back to the earlier authorities will be easily obtainable from the later. The book, as the author says, is composed "in the style of a telegram," and it was perhaps hardly necessary for him to point out that it is not intended to take the place of a text-book. It will be of real value in providing clues through the labyrinth of present-day monographs and periodical articles on International Law; but a non-German reader would have been grateful for a rather fuller index to the multitudinous abbreviations contained in the text.

A. P. H.

Sovereign States and Suits before Arbitral Tribunals and Courts of Justice. By James Brown Scott. 1925. New York University Press. viii + 360 pp.

This volume consists of a series of lectures delivered by the author before the University of New York. It is natural that an American lawyer addressing an American audience on this subject should have particularly in mind the history of the Supreme Court of the United States as the Tribunal with jurisdiction between the states of the Union, and we find accordingly that, while the book contains some account of the steps towards arbitral and judicial settlement of disputes between nations and a chapter devoted to the Permanent Court of Arbitration and the Permanent Court of International Justice, the bulk of the work is devoted to an extremely interesting account of the nature and history of the jurisdiction in suits between states conferred on the Supreme Court by the Constitution. Dr. Scott's thesis is in fact that the Supreme Court is, in relation to its inter-state jurisdiction, a real international tribunal dealing with disputes between independent states, and that it is therefore the forerunner and model of all the international tribunals by which nations attempt to provide for the peaceful settlement of their disputes.

This contention is within limits valid (though it may be doubted whether it would have been welcomed by a New York audience in 1861), but there are some not unimportant considerations which differentiate the jurisdiction of the Supreme Court from that of a tribunal set up for the purpose of settling disputes between nations, and of these we find no hint in Dr. Scott's books. A moment's reflection will show that it was far easier for the states of the American Union to confer jurisdiction for settling disputes between themselves

on the Supreme Court than it could possibly be for the nations of the world to confer an equally extensive jurisdiction on any international tribunal. The Supreme Court was established by the Constitution of 1789, and the existence as independent states of the states which then formed the Union dated at most from 1776. During the greater part of the intervening period, the states had been engaged in a common war against the Mother Country, and the Continental Congress exercised at least the powers of a Supreme Council of Allies. During this period, therefore, the opportunities which the states enjoyed of acting in all respects as independent states must have been limited by the necessities of the case, and the extremely interesting example which Dr. Scott gives of the ratification by Virginia of the Treaty of 1778 between the United States and France does not really weaken the force of this consideration. At the time when inter-state jurisdiction was conferred on the Supreme Court, the states were giving up in favour of the Federal Government some of the most important attributes of sovereignty, and were in fact ceasing to be international persons in the full sense of the word. Further, during their previous existence as British colonies, they had been not unfamiliar with the idea of the settlement of inter-state disputes by the British Courts—not only the Privy Council, but also the Court of Chancery. Finally, the states were at the time, generally speaking, linked by the bonds of common race, common language and a common system of law.

It is therefore not surprising to find that, while the Supreme Court was constituted in 1789, the Permanent Court of International Justice was not set up until 1922. But what is particularly interesting is to observe the reluctance of the states of the Union to admit the jurisdiction of the Court, and the timidity (the word is Dr. Scott's) of the Court in exercising its inter-state jurisdiction. As late as 1832, when Rhode Island attempted to bring a boundary dispute against Massachusetts before the Supreme Court, Massachusetts, through the mouth of no less a person than Daniel Webster, formally objected to the Court's assumption of jurisdiction. In 1799 New York filed a bill in equity against Connecticut; the case came before the Supreme Court on three occasions, but on none of these did Connecticut appear, and no final judgment was given. There was no further case of an inter-state suit till 1830, when New Jersey attempted to sue New York. New York declined to put in an appearance, and the plaintiff state was finally given permission to proceed *ex parte*; New York then filed a demurrer, and the case was finally compromised. It was not until the third case—that of *Rhode Island v. Massachusetts*—that a final judgment was for the first time rendered, and the proceedings in this case are not without interest. The suit was instituted in 1833. In 1838 the Court held that it had jurisdiction, and Rhode Island filed an amended bill; Massachusetts was allowed until 1840 to answer, but when the time came no action had been taken. From 1840 to 1846 was occupied in questions of pleading, and in that year a decision was finally rendered. Thirteen years from writ to judgment; the process of settlement by diplomacy is scarcely slower. It was not until 1918, in the case of *Virginia v. West Virginia*, that the Supreme Court held that there was power to enforce its judgment upon a state, and Dr. Scott clearly thinks that this decision was unwise, even if correct in law.

Another point of interest relates to the right of an individual citizen of the

United States to sue a state not his own before the Supreme Court. According to the Constitution, the jurisdiction of the Supreme Court extended to "controversies between a state and citizens of another state." This would naturally be taken to mean that an individual citizen who had a justiciable complaint against a state could sue that state before the Supreme Court, and so the Court held when the point came before it in the case of *Chisholm v. Georgia*. But at the time when the Constitution was under consideration, strong objections had been taken to the idea that a state could be sued by an individual, and Alexander Hamilton, James Madison and John Marshall had, when defending the Constitution, expressed the view that the provision in question only meant that a state could sue an individual and not that an individual could sue a state. When the Supreme Court held that this contention was wrong, the 11th amendment was passed in 1798 which deprived the Court of the jurisdiction in question. One result of this has been that as regards claims against them by foreigners, the states of the Union enjoy an enviable position. They are under no obligation to allow themselves to be sued in their own Courts; they cannot be sued before the Supreme Court; no foreign state can take up a claim directly against them, and the difficulties in holding the Federal Government responsible for claims against a state are well-known. The result is that a state is in a position, for instance, to default on its external debt with impunity and several of them have availed themselves of this privilege.

Dr. Scott gives an interesting account of the work of the Advisory Committee of Jurists which produced the original draft of the Statute of the Permanent Court of International Justice, and he is quite entitled to bring out, as he does, the influence which the constitution and powers of the Supreme Court had, largely owing to Mr. Root's membership of the Committee, upon the constitution of the Permanent Court. In his view the alterations in the draft made by the Council and the Assembly were not an improvement.

W.

Westlake's Private International Law. Seventh Edition by Norman Bentwich. Sweet & Maxwell. xxxix + 471 pp. (27s. 6d.)

The seventh edition of *Westlake's Private International Law* edited by Mr. Bentwich, the Attorney-General of Palestine, follows the last edition after the short interval of only three years. Yet a new edition is fully justified, for the editor has found "nearly one hundred decisions" which are the basis of fresh rules or modifications of rules formulated in the treatise.

Mr. Bentwich is entitled to great credit for the care and fullness with which the new developments of the law have been noted and appreciated and this valuable work kept well up-to-date from the practical point of view.

It retains, nevertheless, the characteristics which make it specially interesting and almost unique amongst English legal text-books—namely that it is written, one might almost say, from the point of view of a continental lawyer. This is due not merely to Westlake's deep knowledge of continental jurisprudence and literature in the matter of Private International Law and to the illuminating summaries on this subject with which he begins each chapter—though these are rare enough in English authors—but to the short statements of principle, followed as they are by a discussion of the cases for and against the principle

stated. In these matters Westlake adopts something of the continental method, even to the extent sometimes of maintaining the principle boldly in the face of a balance of judicial authority. Nor are instances lacking where his editor is able to show that the courts have later followed his lead. One has only to compare his work with the careful weighing of judicial authority, the detailed consideration of cases on their facts and the scrupulous adherence to the inductive method of his great contemporary Dicey to feel the difference of the manner of approach. The hand of Mr. Bentwich has moreover done something to relieve the work of its chief defect, a certain complexity of style which was the foundation of a comment once made by the late Professor Dicey: "Westlake is always right, when you discover what he means."

The criticisms in point of detail which we have to make are no disparagement to the excellent work done by Mr. Bentwich. The statement on p. 86 that whatever be the domicile of the parties "it (the English court) must recognize their divorce pronounced by a jurisdiction of their nationality" is quite unsupported by any authority and is, we believe, quite wrong. The English authorities are singularly categorical in declaring that only dissolutions of marriage pronounced by or recognized as valid in the courts of the domicile can be recognized in England, and since marriage as involving status is now rigidly distinguished from contractual relationships, no support for this view can be found in the fact that in actions *in personam* nationality has been said to be a source of jurisdiction. On the opposite page, in discussing the case of *Ex parte Mir Anwareddin* (there is a misprint in the case reference which is 1917 1 K.B. 634, not 883—another misprint appears on p. 376; the United States statute which accords separate nationality to married women is the Cable (not Cabot) Act), it is stated that "If the Moslem husband has obtained a divorce from a court in India, the English court, on the authority of *Attorney-General v. Armitage*, would have recognized the decree and treated the marriage as dissolved." Lord Reading C. J., however, said (at p. 642) that "If in India which is the matrimonial domicil the decree of dissolution had been rendered by a court of competent jurisdiction, it would raise the question whether a decree founded on the husband's right to pronounce Talak would be recognized by our court as an effective divorce according to English law, entitling the applicant to marry again in this country. It must certainly *not* be inferred that such a decree of a foreign court would be accepted by our courts as dissolving the marriage contracted here." There is, moreover, nothing in the Armitage case to suggest that an English court would recognize a divorce based on any such ground.

The new Real Property legislation is so complicated that it is excusable to fail to appreciate all its bearings. References to the "Land Transfer Act, 1897, making the executor or administrator a real representative, &c." (see p. 221) are, however, now out of date, for it is repealed and re-enacted with amendments by the Administration of Estates Act, 1925, which provides that real estate to which a deceased person was entitled for an interest not ceasing on his death is to devolve like a chattel real on his personal representative.

It has become a very common mistake to attempt to read much more into the judgment of the House of Lords in the *Daimler Co.* case than the decision itself warrants, and Mr. Bentwich on pp. 382-3 seems to have fallen into it.

He says " By a majority there it was held that a corporate body must be deemed to be domiciled in the place of its administrative centre, being the place at which the persons directing its policy habitually meet : and this domicile prevailed over the national character it acquired by the law of its incorporation to determine its capacity or incapacity to trade during the war. . . ." Then referring to the Treaty of Peace with Germany Order he says : " This definition appears to indicate a return by Great Britain to the pre-war standpoint with regard to the nationality of corporations : that it is determined by the law of its incorporation and not by the national character of the members of the controlling board." The judgment in the *Daimler* case was a decision as to enemy character in time of war, and as this work correctly points out in another place, enemy domicile in time of war is governed by entirely different rules from those which govern domicile proper which is the criterion of status. This decision, therefore, is not necessarily any authority on the question of domicile of a company in the strict sense, and still less on the question of the nationality of a company, and it appears to be a mistake to attempt to read any of these things into it. Two sentences from the judgment of Lord Parker in that case make this abundantly clear (1916 2 A. C. pp. 337 and 339) : " Under these circumstances it is strictly speaking unnecessary to consider whether a company incorporated in the United Kingdom can under any and what circumstances be an enemy or assume an enemy character. The question is, however (he proceeds to consider it) . . . A natural person though an English-born subject of His Majesty may bear an enemy character. . . . If he has what is known in Prize Law as a commercial domicile among the King's enemies, his merchandise is good prize at sea. . . . How are such rules to be applied to an artificial person incorporated by forms of law ? . . . In the case of an artificial person what is the analogue to voluntary residence among the King's enemies ? "

Mr. Bentwich concludes by an appeal for the settlement by international convention of the questions of Private International Law, with regard to which the jurisprudence of countries differs, a method of remedying the evil which he thinks England is specially called upon to promote. Whether or not the practice, whereby the courts of different countries co-operate with each other in taking evidence or in other ways under letters of request, can be properly said to be part of Private International Law, it is at any rate closely connected with it and it is satisfactory to be able to record that this country has now procedural conventions with Turkey and Czechoslovakia in addition to those made two or three years ago with France and Belgium.

E.

La " Querela Pacis " of Erasmus. 1517. Étude d'histoire pacifiste. By Élise Constantinescu Bagdat. Paris: Les Presses universitaires de France. xv + 218 pp.

A neglected work of Erasmus is brought to our notice in the form of a careful French translation of the *Querela Pacis* by Mademoiselle Élise Constantinescu Bagdat, with her interesting comments on the causes which led to the writing of this curious little work, and its historical and philosophical value.

For English readers the ground has been already covered by the writings of Dr. P. S. Allen, but Miss Bagdat has devoted many years to research into com-

plicated contemporary politics, and the result is greatly to enhance the interest of the "Complaint of Peace" itself.

It was written in 1516, just at the moment when the young Burgundian Prince found himself King of Spain. Hitherto he had been content to follow the policy of his two chief advisors in the States General, a policy of opposition to his grandfather, the Emperor Maximilian, and of friendship for France. The one aim of these statesmen was peace for the Low Countries, but it is difficult for us to think they were right in looking to France for an ally. They clearly feared that Charles, soon to be Emperor, would be drawn into the welter of European conflict.

Erasmus enjoyed a great reputation and had already put forward strange and novel views as to the evil of war. It was natural then that his two friends should turn to him to embody these views for the acceptance of the Prince in whose hands lay their destiny. The authoress admits that the views of Erasmus and his friend Sir Thomas More exercised far less contemporary influence than those of Macchiavelli whose "Prince" was written in 1513. The age was not ready for their teaching, but it bore fruit in the writings of the Eighteenth Century Humanitarians who claimed the right of the individual to a peace unbroken by the ambition of princes.

The "Complaint of Peace" is a lament made by Peace herself on the universal neglect shown to her by every rank and every nation. It must have needed no little courage to challenge thus kings, statesmen and magistrates, bishops, professors and monks, and even to carry the charge into lowly homes and the heart of man. The chief interest lies in the remedies which Erasmus proposes for the misery around him. Royal marriages were the pretext for enlargement of territory and ceaseless wars. He, therefore, proposes that land should never pass to another ruler as dowry or inheritance and that boundaries should be fixed for all time.

His plea for arbitration and the reduction of armies, and his arguments as to the excessive taxation caused by war seem very modern, and to those who are interested in the origin and growth of ideas as to international understanding, and the peaceful settlement of disputes, this book should commend itself for study.

S.

Das Werk von Locarno: eine völkerrechtlich-politische Studie. Von Dr. Karl Strupp. 1926. Berlin und Leipzig: Walther de Gruyter & Co. 180 pp.

This book is a careful and generally lucid exposition, by a recognized teacher of international law, of the meaning of the Locarno agreements to which Germany was a party. In spite of the sub-title, the point of view is mainly that of the international lawyer; politics figure little except in the fifty-two pages of historical introduction which summarize the events leading up to Locarno, from the earliest French demands for the Rhine frontier during the war to M. Painlevé's speech at Geneva last September. Nothing is said of the attitude of parties in Germany or elsewhere, or of the play of personalities at Locarno or in Berlin. The book is elaborately annotated with references to standard works by writers of many nationalities, and the complete French and German texts of the Locarno documents are given in an appendix; further, whenever the

author refers to a document, he follows the excellent practice of setting out the relevant passage at length in the text, in both French and English in the case of the League Covenant. His use of spaced and heavy type is, however, perhaps excessive.

Though his chief interest is legal, Dr. Strupp does not fail to appreciate the importance of the political advance of which the treaties are symbols, and he naturally devotes particular attention to those points with which German public opinion is principally concerned, such as the exceptions admitted in Article 2 of the *Westpakt*, the obligations of Article 16 of the League Covenant, and the probable reactions to Locarno in the Rhineland. He says little, however, perhaps tactfully, of the situation with regard to Germany's eastern and southern frontiers, and though he gives the text of the French treaties of October 16 with Poland and Czechoslovakia in a foot-note to a foot-note, he does not discuss them. But his own position is clear: even a dictated peace, so long as the signatories were not under actual physical duress, is legally binding, and alterations must be brought about by the Locarno spirit. In dealing with particular points, he suggests with regard to Article 2 of the Security Pact (p. 71) that, as "legitimate defence" is defined by the words which follow, so the parties to the Pact might with advantage explain further what is meant by "aggression" and "unprovoked attack." Discussing Article 16 of the Covenant and the collective note of the Allies to Germany concerning it, he states his view that Germany could without disloyalty, though a Member of the League, refuse "in a concrete case" to allow other Members to march their troops through her territory in execution of the sanctions. With respect to the Arbitration Treaties, which he would like to see extended to Great Britain and Italy, he claims that their main ideas were contained in the Huber-Gaus treaty of December 1921, between Germany and Switzerland; he argues ingeniously (p. 95) that Germany could use them to challenge decrees of the Rhineland Commission, since either France or Belgium must admit liability for the acts of that body; while, as regards their drafting, he suggests with some reason (p. 96 n.) that Articles 14-16 are out of place, as applying equally to Parts I and II.

Dr. Strupp's argument as to the effect of Article 10 of the League Covenant is not quite clear, and one or two rather pedantic points seem hardly worth making; but this is not typical of the book, which deals with a great subject in a broad and reasonable spirit. Nor can any good European object if it ends on a note of warning, urging Germany's late enemies to meet her with sympathy when sooner or later, in reliance on Article 19 of the Covenant, she demands the removal of "international conditions whose continuance might endanger the peace of the world."

J. R. M. B.

The Permanent Court of International Justice and the Question of American Participation. By Manley O. Hudson, Bemis Professor of International Law in Harvard University. Harvard University Press and Humphrey Milford. (17s. net.)

This book is made up of a number of articles and addresses by Professor Hudson, published and delivered during the years 1922-4, and, like most collec-

tions of that kind, it suffers from lack of orderly arrangement, and a considerable amount of repetition. But the substance of the work is both interesting and valuable. The text falls into two parts : (1) A description of the Court and its work, and (2) A discussion of the question of American participation.

In the first part the author shows how the Court was set up, gives an outline of its organization and jurisdiction and of the cases heard down to the case of the *Interpretation of the Treaty of Neuilly* (Sept., 1924). His treatment of the subject is, generally speaking, marked by accuracy and sound judgment, though the account of the cases is so condensed that the full effect of the opinions and judgments does not always emerge clearly. This is particularly noticeable in the *German Settlers in Poland*, where a vital point in the Court's ruling, viz. : that legislation general in its terms constitutes an infringement of the Minorities clauses if it is discriminatory in its effect and application, is not made sufficiently apparent.

A valuable feature is the careful and detailed exposition of the action taken to give effect to each of the opinions and judgments of the Court, which shows convincingly the practical results achieved. But by far the most interesting passages in this part of the book are those treating of the Court's Advisory Jurisdiction. Professor Hudson presents an able defence of a function of the Court which has given rise to so much misconception and criticism. He shows conclusively that the Court in giving advisory opinions is acting in a judicial capacity and supports his thesis by referring to a number of precedents in the Constitutions of various States of the Union. These are especially interesting to the English lawyer, who, whilst familiar with the exceptional advisory jurisdiction of the Judicial Committee of the Privy Council under 3 and 4 Will. IV, c. 41, s. 4, has no experience of a system providing for regular reference of constitutional questions to the Bench by the Executive and Legislature, such as Professor Hudson shows to exist in several of the States. The author also deals with the question of the effect of the Court's decisions as precedents. He fully appreciates the importance of this point, and brings out forcibly the reasons which make the application of principles laid down in decided cases to matters subsequently litigated before the Court a natural and necessary process. This is indeed an inherent characteristic of judicial bodies, and it is given free play by Article 38 (4) of the Court's Statute. The reservation there made, that decisions only have binding force between parties and in respect of the particular case, was not intended to derogate from the application of decisions as precedents. Proof of this is afforded even in the short period of the Court's life, for over and over again its decisions have been cited in argument, and discussed, applied and distinguished by the Court itself in its judgments and opinions. Moreover, it is to be noted that advisory opinions and judgments have in every instance been treated as of equal authority as precedents. It is impossible to exaggerate the value of the principle in question, for international law being, at least for the present, mainly "Common Law" depending on custom and practice and their application to new circumstances, the best and surest way of building up a body of sound and consistent rules is by way of case law.

As already stated the second part of Professor Hudson's book is devoted to the question of American participation in the World Court, and it would be difficult to present the arguments in favour of participation more cogently.

Professor Hudson examines and answers the objections put forward from time to time by the various American schools of thought, and makes short work of those politicians who, whilst purporting to advocate participation in a World Court, are ingenious to find pretexts for opposing *this* Court. As he rightly shows, it is a case of this Court, or none.

The learned author gives consideration to the various methods by which the United States could join the Court without committing themselves to the League of Nations and gives the weight of his approval to the proposal, which, indeed, he may claim to have originated, that the United States should adhere to the Statute without amendment, but subject to reservations enabling them to take part in the election of the judges by the Council and Assembly of the League whilst at the same time keeping free of any participation in that institution. This, in substance, is the scheme that has now been adopted by the American Senate. The reservations will of course require the acquiescence of the other states signatory of the Statute, but this should not cause any serious difficulty. There is one point mentioned incidentally by Professor Hudson, the accuracy of which is open to doubt, and that is this: he says that even without adhesion to the Statute, the Court would be open to the United States, which could at any time appear as a party in any case which they had agreed with another state to refer to the Court. This view is based upon Article 35 of the Statute, which provides that "the Court shall be open to the Members of the League and also to states mentioned in the Annex to the Covenant" (of which of course the United States are one). But it is submitted that the true meaning of this provision is that the Court is "open" to the Members and states in question upon signature and ratification of the Statute, but not otherwise. This appears from the Resolution of the Assembly approving the Statute, dated December 13, 1920, paragraph 3 of which states that "as soon as this protocol (i. e. the protocol of acceptance of the Statute) has been ratified by the majority of the Members of the League, the Statute shall come into force *and the Court shall be called upon to sit in conformity with the said Statute in all disputes between Members or States which have ratified.*" Further if the matter be considered on principle it does not seem reasonable that the International Court should be open indiscriminately to states which have recognized and agreed to its Constitution and rules, and to a state which has abstained from any act of adhesion.

In conclusion one may perhaps be allowed to pay a tribute to Professor Hudson for the sane and moderate tone of his work. His position is one of whole-hearted support of the Court, but the sound judgment with which he writes, and the absence of exaggeration or excessive claims, make his support the more effective and weighty.

A. P. F.

The Swiss Civil Code. English Version with Vocabularies and Notes. By Dr. Ivy Williams. Oxford University Press. xlv + 287 pp. (10s. net.)

Dr. Ivy Williams has given us an admirable translation of the Swiss Civil Code, which was enacted in 1907, and which came into force in 1912. The Code was promulgated in three languages, each of which is authoritative, and this must have added to the difficulty of her task. The Code compresses the whole civil law of Switzerland into 977 short pithy sections, so that he who runs may read.

France codified her civil law by the Code Napoleon some 120 years ago, and the other continental nations have followed suit. If you ask an educated Frenchman some question of law, he will usually give you a clear answer, and will often cite the number of the section in point. If you ask a similar question of an Englishman, he will either give you a sketchy guess, or refer you to his solicitor, who in turn will consult some barrister who has made a speciality of that particular subject. Englishmen like talking about law and order, but they have a cordial dislike of order in law. They stick obstinately to a customary law which is plastered over with overlapping and often unintelligible statutes. Take the law of wills as an example. The Swiss law relating to wills and executors is contained in thirty-nine brief and intelligible sections. Compare with this the two ponderous volumes of *Williams on Executors*. The official index to statutes in force in 1924 cites 37 Acts relating to wills, and this *congeries* of enactments will be added to and aggravated with scattered provisions as to wills in the various Law of Property Acts which come into force in 1926. The Swiss law as to pledges and liens (Title XXIII) is both clear and interesting. It is interesting as a commentary on our seven Acts relating to Bills of Sale, and our nine Acts relating to pawnbrokers, and divers other scattered enactments.

A good many of the provisions in the Swiss Code seem strange to an Englishman. But it is futile to criticize the laws of another nation without intimate knowledge of the conditions of life and society which are dealt with by those laws. A nation's laws, like a nation's clothes, are the result of heredity and environment. Clothes suitable for an Eskimo would not be suitable for an Italian living in Sicily, and the same rule applies to laws. For all practical purposes we, in England, got rid of nuncupative wills as long ago as the Statute of Frauds (29 Car. II, c. 3). They were regarded as incentives to fraud and litigation. But Section 506 of the Swiss Code provides that "where a testator, by reason of exceptional circumstances, such as imminent danger of death, absence of means of communication, an epidemic or war, is prevented from making his will in any other form, he is entitled to make it orally." Two witnesses are required. Judging by the amount of litigation which arises in England over deathbed wills in due form, the Swiss rule would be a dangerous one to adopt here. But the Swiss may be more honest and less litigious than we are. The law of divorce under the Code is a good deal wider than ours. It allows divorce for misconduct, crime, desertion and insanity. Section 142 then goes on to provide that "either the husband or the wife can sue for a divorce where the conjugal relations are so seriously strained that life in common has become intolerable." If this rule were enacted in England, it would be interesting to see to what percentage of marriages the rule applied, and it would be instructive to watch the criteria of incompatibility which our courts would work out. The mutual relations of husband and wife are carefully worked out, and settle points which we might debate in England. By Section 160 "The husband is the head of the conjugal union. He chooses the place of abode and duly provides for the maintenance of wife and children." By Section 161 "The wife . . . has the management of household affairs." By Section 162 "The husband (as regards third parties) represents the conjugal union," but by Section 163 the wife has *prima facie* authority to bind the conjugal union in providing "current necessities for the home."

Dr. Williams has added to the usefulness of her translation by careful cross-references, and occasional concise explanatory foot-notes. It is to be hoped that her success with the Swiss Code will encourage her to provide us with translations of other important Codes. The Society of Comparative Legislation does useful work in summarizing, or commenting on, current foreign legislation, but this work does not dispense with the necessity of having the full text of a foreign law for the purpose of study and comparison.

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- See also under *Extraterritoriality*.

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- Palestine. *See under Egypt.*
- Parliaments of Foreign Countries. Methods adopted for dealing with International Questions. Reports from His Majesty's Representatives abroad. (*Miscellaneous No. 19, 1924.*) [*Cmd. 2282.*] 1s. (1s. 0½d.)
- Peace Treaties. Protocol amending Paragraph 13 of Annex II to Part VIII of the Treaty of Versailles, of June 28, 1919. Paris, November 22, 1924. (*Treaty Series No. 5, 1925.*) [*Cmd. 2313.*] 1d. (1½d.)
- Protocol of an amendment to Article 393 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace, signed at Geneva, June 14, 1923. (*Treaty Series No. 6, 1925.*) [*Cmd. 2314.*] 1d. (1½d.)
- The Treaty of Peace between the Allied and Associated Powers and Germany (with Amendments) and other Treaty engagements signed at Versailles, June 28, 1919, together with the Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace. 3s. (3s. 4d.)
- Poland. *See under Locarno Conference, Reparation.*
- Portugal. Exchange of Notes between Great Britain and Portugal extending until November 16, 1926, the operation of the Agreement providing for the Settlement by Arbitration of certain classes of Questions which may arise between the two Governments. August 29, 1925. (*Treaty Series No. 41, 1925.*) [*Cmd. 2516.*] 1d. (1½d.)
- Notes exchanged between the United Kingdom and Portugal regarding the cancellation of the British Concession at Chinde, and the Portuguese Concession at Chipoli. Lisbon, May 19, 1925. (*Treaty Series No. 32, 1925.*) [*Cmd. 2457.*] 1d. (1½d.)
- *See also under China, Reparation.*
- Reparation. Agreement between the Governments of Great Britain, Belgium, France, Italy, Japan, the United States of America, Brazil, Greece, Poland, Portugal, Roumania, the Serb-Croat-Slovene State and Czechoslovakia regarding the distribution of the Dawes Annuities. Paris, January 14, 1925. (*Miscellaneous No. 4, 1925.*) [*Cmd. 2339.*] 4d. (4½d.)
- Agreement between Great Britain and Germany amending the method of administering the German Reparation (Recovery) Act, 1921. (*Treaty Series No. 20, 1925.*) [*Cmd. 2384.*] 2d. (2½d.)
- German Reparation (Recovery) Act, 1921. Statement showing the Amounts paid into the Special Account under Section 1 (3) and the Application thereof, during the period April 1, 1924, to Closing of Account. [*Cmd. 2524.*] 1d. (1½d.)
- Official Documents of the Reparation Commission. IX, Regulations for Deliveries in Kind. 5s. (5s. 2½d.) X, Report of the Agent-General for Reparation Payments, May 30, 1925. 5s. (5s. 2d.)
- *See also under Bulgaria.*
- Rhine. Convention and Additional Protocol relating to Rhine Navigation Certificates drawn up by the Central Commission of the Rhine to replace certain Articles of the Convention of October 17, 1868, and the Convention of June 4, 1898. Strasbourg, December 14, 1922 and December 22, 1923. (*Treaty Series No. 46, 1925.*) [*Cmd. 2521.*] 2d. (2½d.)
- Roumania. *See under Reparation.*
- Russian Socialist Federative Soviet Republic, Criminal Code of the. 9d. (10d.)
- Security Pact. Papers respecting the proposals for a Security Pact, made by the German Government on February 9, 1925. (*Miscellaneous No. 7, 1925.*) [*Cmd. 2435.*] 1s. (1s. 1d.)
- Reply of the German Government to the Note handed to Herr Stresemann by the French Ambassador at Berlin on June 16, 1925, respecting the Proposals for a Security Pact. (*Miscellaneous No. 9, 1925.*) [*Cmd. 2468.*] 3d. (3½d.)
- *See also under Geneva Protocol, Locarno Conference.*
- Serb-Croat-Slovene State. *See under Reparation.*
- Spain. Agreements between the United Kingdom and Spain providing for the settlement by Arbitration of certain classes of Questions which may arise

between the two countries, signed at London, October 14, 1903 and February 27, 1904. (*Treaty Series No. 18, 1903.*) [*Cmd. 1837*] and (*Treaty Series No. 4, 1904.*) [*Cmd. 1947.*] Reprints. 1d. ($1\frac{1}{2}$ d.) each.

State Papers, British and Foreign. Vol. CXVI. 1922. Incorporating Hertslet's Commercial Treaties. 25s. (25s. 9d.)

Sweden. Agreement between Great Britain and Sweden for the reciprocal exemption from Income Tax in certain cases of Profits accruing from the Business of Shipping. (*Treaty Series No. 11, 1925.*) [*Cmd. 2322.*] 1d. ($1\frac{1}{2}$ d.)

— Notes exchanged between the United Kingdom and Sweden further renewing the Arbitration Convention of August 11, 1904. London, November 9, 1924. (*Treaty Series No. 28, 1925.*) [*Cmd. 2426.*] 1d. ($1\frac{1}{2}$ d.)

Treaties, &c., between the United Kingdom and Foreign States. Accessions, Withdrawals, &c. (*Treaty Series No. 38, 1924.*) [*Cmd. 2331.*] 3d. ($3\frac{1}{2}$ d.)

Tribunaux arbitraux mixtes institués par les Traités de Paix, Recueil des décisions des. Nos. 39–52 (June 1924–July 1925.) Nos. 39–42 (combined), 16s. ($16s. 3\frac{1}{2}d.$); Nos. 43–4 (combined), 8s. ($8s. 2d.$); Nos. 45–8 (combined), 16s. ($16s. 4d.$); Nos. 49–52 (combined), 16s. ($16s. 3\frac{1}{2}d.$); No. 48 bis, Tables du Tome IV, 4s. ($4s. 2d.$)

United States of America. *See under* Canada, China, Reparation.

Versailles, Treaty of. *See under* Peace Treaties.

SUMMARY OF EVENTS¹

March 1—December 31, 1925.

(Together with dates of earlier events not previously noted.)

COMPILED BY THE BRITISH INSTITUTE OF INTERNATIONAL AFFAIRS.

Abbreviations.

A. J. I. L., *American Journal of International Law*. *Cmd.*, Great Britain, Parliamentary Papers. *E. N.*, *L'Europe Nouvelle*. *F. F.*, *Feuille Fédérale* (Swiss). *L. N. M. S.*, *League of Nations Monthly Summary*. *L. N. O. J.*, *League of Nations Official Journal*. *L. N. T. S.*, *League of Nations Treaty Series*. *Sver.*, *Sveriges Överenskommelser med Främmande Makter*. *T.*, *The Times* (London).

Afghanistan.

1925. June 2. Italian engineer named Piperno, who had been previously sentenced to death for the murder of an Afghan policeman on July 27, 1924, but whose sentence had been remitted on payment of "blood money", executed in Kabul. June 12, formal protest made by Italian Government, demanding public apology, restoration of blood money and payment of indemnity of £7,000. Aug. 18, incident closed by presentation of Afghan Government's apologies to Italian Minister at Kabul and payment of £6,000.

Albania.

1925. Aug. 6. Conference of Ambassadors, to which question of Monastery of St. Naoum had again been referred owing to failure of negotiations for settlement between Albania and Serb-Croat-Slovene Kingdom, decided to award St. Naoum to Serb-Croat-Slovene Kingdom and village of Piskkopeya to Albania. Aug. 13, Serb-Croat-Slovene Kingdom accepted decision. Oct. 15, Albanian Government accepted decision. Nov. 6, new frontier line formally approved by Conference of Ambassadors.

Argentina.

1925. July 9. Treaty with Bolivia regarding frontier delimitation signed at La Paz. Aug. 4. Convention concluded with Costa Rica regarding exchange of diplomatic mails. Nov. 3. Consular convention with the Netherlands concerning Dutch East Indies, Surinam and Curacao signed at The Hague.

Austria.

1924. Aug. 24. Aerial navigation agreement concluded with Hungary. Sept. 27. Convention concluded with Italy regarding execution of Article 275 of Treaty of St. Germain. Oct. 31. Protocol regarding archives signed with Italy at Vienna. Dec. 6. Exchange of notes with Norway providing for reciprocal exchange of documents concerning the civil status of nationals. (*L. N. T. S.* XXXI.) Dec. 13. Agreement with Italy for amicable settlement of claims for compensation pending before Austro-Italian Mixed Arbitral Tribunal and for systematization of reports from the Austrian and Italian offices of Verification and Compensation concluded at Rome. 1925. Feb. 14. Agreement with Italy, regarding arbitration under Paragraph 4 of Annex to Section IV, Part X, of Treaty of St. Germain, signed at Rome. June 16, Ratifications exchanged at Rome.

¹ The information given has been collected from newspapers and other sources, and it has not been possible in every case to test its accuracy. References in brackets indicate where texts are to be found.

- Feb. 15. Judicial convention concluded with Rumania.
- Feb. 23. Agreement with Italy for amicable settlement of questions regarding interests in Tyrol signed at Rome.
- Feb. 26. Ratifications exchanged of arbitration convention with Poland signed at Warsaw on Nov. 13, 1923.
- March. 4. Declarations exchanged with France regarding transmission of judicial acts, &c.
- April 18. Austrian Government asked League of Nations to appoint experts to investigate Austria's economic position. May 23, Secretary-General informed Austrian Government that Austrian Committee approved proposal and were in agreement as to experts to be appointed. June 9, League Council approved appointment of Mr. W. T. Layton and Professor Rist as experts. June 30, Mr. Layton and M. Rist arrived in Vienna. Sept. 4, Experts' report submitted to League Council. (*L. of N. Doc. C. 440 (i) M. (i) 162, 1925 II.*)
- May 6. Aerial navigation agreement with Poland concluded at Warsaw.
- May 19. Aerial navigation agreement with Germany signed at Vienna. Sept. 25, Ratifications exchanged.
- July 29. Agreement with Germany abolishing passport visas concluded at Berlin. Came into force Aug. 12, 1925.
- Sept. 10. League of Nations Council adopted recommendation of Finance Committee that, on certain conditions, including continuance for three years of foreign advisor to Austrian National Bank and retention of right of Council to re-establish control within a period of ten years, the control exercised by the Commissioner-General should be changed in character from January 1, 1926, and terminated after submission of closed accounts for 1925. Oct. 14, Austrian National Council passed resolution agreeing to conditions. Nov. 27, resolution approved by Austrian Federal Council. Dec. 9, League Council adopted resolution regarding arrangements consequent upon approaching limitation and termination of control; declaration regarding arrangements signed by Austrian representative at Geneva. (*L. of N. Doc. C. 797, 1925 II.*)

Baltic States.

1925. Aug. 19. Agreement for suppression of liquor smuggling signed at Helsingfors by Denmark, Estonia, Finland, Germany, Latvia, Poland and Danzig, Norway, Sweden and U.S.S.R.

Belgium.

1925. Feb. 13. Treaty for conciliation and judicial settlement of disputes concluded with Switzerland.
- March 4. Agreement concluded with Great Britain for extension to Newfoundland of provisions of convention of June 21, 1922, concerning transmission of judicial acts. March 13, agreement concluded for extension of provisions to Palestine.
- April 3. Treaty with Netherlands regarding the administration of the Scheldt, to replace treaty of April 19, 1839, signed at The Hague. Notes exchanged between Dutch and Belgian Governments regarding question of Wielingen Channel, and between Dutch and British and French Governments regarding cancellation of treaty of April 19, 1839. (Texts of notes. *Gazette de Hollande*, 1 and 8.5.25.)
- July 17. Agreement signed with France for reciprocal repatriation of minors in residence in either country against the wishes of their legal guardians.
- Sept. 1. Agreement signed with Poland regarding scientific, literary and scholastic relations between the two countries.
- Sept. 3. Declaration with Switzerland regarding legalization of civil acts signed at Berne.
- Dec. 15. Convention with France regarding taxation of nationals concluded at Brussels.
- Dec. 21. Agreement concluded with Germany regarding life insurance policies taken out by Belgians with German companies before the war.

Bolivia.

1925. June 2. Protocol with Peru regarding frontiers signed at La Paz.
- Sept. 3. Four protocols signed with Brazil for execution of boundary treaty of Nov. 17, 1903.

Brazil.

1925. March 4. Procès verbal signed at meeting at Washington between representatives of Brazil, Colombia, Peru and United States, settling boundary controversies between Brazil, Colombia and Peru.
- March 30. Convention with Uruguay regulating the conduct of the two Governments in event of internal disturbances, signed at Montevideo.

Bulgaria.

1924. March 28. Two protocols signed at Sofia regarding costs of occupation and regarding allocation of sums paid by Bulgaria to cover costs of occupation. (*L. N. T. S. XXXI.*)
- Sept. 29. Two proposals submitted (1) by Bulgarian Government, (2) by Greek Government, for protection of Greek minorities in Bulgaria and Bulgarian minorities in Greece, signed (1) by Bulgarian representatives and representatives of the League of Nations; (2) by Greek representative and representatives of the League of Nations. (*L. N. T. S. XXIX.*) (1) ratified by Bulgaria Dec. 29, 1924; (2) rejected by Greek National Assembly Feb. 3, 1925.
1925. Feb. 3. Declaration signed between Bulgaria and Czechoslovakia providing for exchange of particulars regarding nationals of one country resident in the other.
- Feb. 25. Agreement reached with Serb-Croat-Slovene Kingdom for appointment of a Mixed Commission to investigate frontier incidents.
- March 26. Permanent Court of International Justice refused request of Greece for interpretation of Judgment given by Court on Sept. 12, 1924, regarding Graeco-Bulgar dispute over interpretation of Treaty of Neuilly.
- April 10. Conference of Ambassadors in reply to request made by Bulgarian Government for additional troops to meet the danger of a communist rising, authorized the Government to enrol 3,000 volunteers for limited period. April 22, Conference of Ambassadors gave permission for temporary increase of Bulgarian militia by 7,000 men.
- July 9. Transit convention signed with Serb-Croat-Slovene Kingdom.
- Sept. 12. Agreement concluded with Serb-Croat-Slovene Kingdom regarding immovable Bulgarian property sequestered by Serb-Croat-Slovene Kingdom.
- Oct. 16. Treaty of friendship with Turkey, providing for conclusion of arbitration convention and annexed protocol regarding minorities, property rights, &c., signed at Angora.
- Oct. 19. Shots exchanged between Greek and Bulgarian sentries on frontier near Demir-Kapu; Greek soldier killed; fighting continued till mid-day on Oct. 20.
- Oct. 21, Bulgarian Government proposed appointment of Mixed Commission to investigate responsibility for incident; Greek note demanding apology, punishment of officers responsible and payment of indemnity delivered to Bulgarian chargé d'affaires at Athens. Oct. 22, Greek troops, after artillery preparation along about 16 miles of frontier, invaded Bulgarian territory and advanced towards Petritch which they bombarded. Oct. 23, Appeal of Bulgarian Government for intervention received by League of Nations Secretariat; meeting of League Council summoned for Oct. 26; M. Briand, as President of Council, requested both parties to withdraw troops behind their respective frontiers and suspend all further military operations. Oct. 26, League Council, not being satisfied that M. Briand's request had been carried out, asked both Governments to inform it within 24 hours that unconditional orders had been issued to troops to retire within frontiers and to state within 60 hours that troops had withdrawn and all hostilities ceased; Governments of France, Great Britain and Italy asked to send officers to report to Council as soon as its request had been fulfilled. Oct. 27, Greek representative informed League Council that before its decision of Oct. 26 had reached Greek Government, agreement had been concluded, as result of mediation by Rumanian Minister at Athens, for withdrawal of troops and re-establishment of frontier guards in their respective posts. Oct. 28, Protocol signed by Allied military attachés and Greek and Bulgarian officers providing for immediate cessation of hostilities, evacuation of Greek troops by 10 a.m. on Oct. 29, and re-occupation by Bulgarian troops beginning at 1 p.m. on Oct. 29. Oct. 29, League Council received assurance from Allied military attachés that Greek troops were withdrawing; Council decided to appoint Commission to investigate incidents and report by end of November; Greek and Bulgarian representatives agreed in advance to accept Council's decisions. Council subse-

quently notified that Greek troops had entirely evacuated Bulgarian territory by midnight, Oct. 28. Nov. 6, Commission of Enquiry, with Sir Horace Rumbold as Chairman, met at Geneva; left on Nov. 7 and visited Belgrade, frontier districts concerned, Athens and Sofia; on Nov. 28 Commission communicated to two Governments and to Secretary-General of League its report summarizing the results of the inquiry, dealing with the question of responsibilities and indemnities, and making recommendations for future incidents. Dec. 14, League Council approved Commission's report and recommendations; laid down definite principle that where territory is violated without sufficient cause reparation is due; decided that Greek Government was not justified in causing armed forces to cross Bulgarian frontier and should pay Bulgarian Government within two months the sums of 20,000,000 and 10,000,000 levas (£45,000 in all) as compensation in respect of movable property and reparation for material and moral damage. Dec. 13, Greek Government informed its representative at Geneva that it accepted Council's decision in principle.

Dec. 29. Bulgarian Government informed that Conference of Ambassadors had decided to recall the Inter-Allied Military Commission of Control.

Canada.

1925. Feb. 24. Treaties signed with United States of America: (1) treaty defining more accurately frontier between the two countries; (2) convention, protocol and agreement to regulate level of Lake of the Woods; (3) supplementary convention providing for extradition on account of offences against laws for suppression of traffic in narcotics. Ratifications of all three agreements and of convention of June 6, 1924, regarding smuggling along the frontier, exchanged at Washington, July 17, 1925. (*Cmd.* 2510, 2511, 2512, 2513.)

April 11. Commercial *modus vivendi* concluded with Spain by exchange of notes of 10 and 11 April, 1925, to come into force April 20, 1925.

July 7. Trade agreement concluded with Governments of British West Indies.

Oct. 28. Ratifications exchanged of commercial treaty with the Netherlands of July 11, 1924.

Oct. 2. Agreement concluded with United States regarding interference by wireless stations on board ship with broadcasting stations on shore.

Chile.

1925. March 9. President Coolidge gave award in dispute between Chile and Peru regarding Tacna and Arica, submitted to him for arbitration in July, 1922; under terms of award plebiscite to be held to decide sovereignty of Tacna and Arica, supervised by Commission of one Peruvian and one Chilean delegate, with chairman appointed by President Coolidge; Province of Tarata on northern boundary of Tacna definitely attributed to Peru. March 23, President Coolidge appointed General Pershing chairman of Plebiscite Commission. April 2, Peruvian note handed to President Coolidge demanding that before holding of plebiscite territory should be evacuated by Chilean troops and occupied by U.S. troops. April 9, President Coolidge replied that his decision must be considered final and guarantees asked for could not be granted. April 13, Chilean Government announced its willingness to return Province of Tarata to Peru. June 3, Peruvian Government announced that Peru would take part in plebiscite. Aug. 5, first formal meeting of Plebiscite Commission held at Arica. Sept. 1, Tarata Province transferred to Peru. Nov. 21, Chilean delegate withdrew from Commission until such time as Commission had decided electoral regulations and date of plebiscite. Dec. 10, General Pershing fixed April 15, 1926, as date of plebiscite; Chilean delegate demanded that it should be held earlier, and appealed to President Coolidge, as arbitrator, against the Plebiscite Commission's decision. Dec. 29, officially announced that General Pershing was resigning from chairmanship of Plebiscite Commission.

China.

1925. Jan. 29. Shanghai occupied by Chang Tso-lin's troops.

Feb. 1-April 21. "Reorganization Conference," attended by members of Peking Government and military leaders, held in Peking; resolved to convene a pro-

- visional Senate and to appoint a Commission to draft a new constitution for submission to a Conference to consist of delegates elected by the Provinces.
- Feb. 11. Peking Government protested to Japanese and Soviet representative at Peking against section of Japanese-Soviet agreement of Jan. 20, 1925, whereby Soviet Government recognized Portsmouth Treaty of Sept. 5, 1905.
- Feb. 23. Manchu ex-Emperor left Japanese Legation at Peking and took refuge in Japanese Concession at Tientsin.
- March 6. Soviet Ambassador at Peking delivered note to Peking Government announcing withdrawal of Soviet forces from Outer Mongolia. (*Russ. Inf. and Rev.*, 1.5.25.)
- April 12. "Gold Franc Agreement" concluded with France, providing for method of payment of Boxer Indemnity and for remission of unpaid balance of French share. (*E. N.*, 8.7.25.) May 7, Agreement concluded with Japan for utilization for educational purposes of part of Japanese share of Boxer Indemnity refunded by Japan. July 16, President Coolidge issued executive order remitting all payments of American share received after Oct. 1, 1917, to be used for educational purposes. Sept. 5, Agreement concluded with Belgium regulating method of payment of balance of Belgian share of indemnity.
- May 16. Mukden-Shanhaikwan section of Peking-Mukden Railway returned by Chang Tso-lin to control of railway administration.
- May 30. Chinese students, demonstrating in sympathy with Chinese strikers in Japanese mills, attacked police station in international concession at Shanghai; nine Chinese killed and several wounded. June 1, General strike declared at Shanghai; strike spread to Hongkong by June 21. Rioting, attacks on foreigners and student demonstrations throughout June at Shanghai, Peking, Chinkiang, Hankow, Haifeng, Amoy, Tientsin and other places. June 23, riots at Canton during which foreign concession fired on, a French citizen killed, British subjects wounded and a number of Chinese killed and wounded. Further rioting during July at Chungking, Swatow, &c. During August strikes and riots at Tientsin and strike of Chinese employees at British Legation at Peking. Aug. 12, Regulations issued at Canton prohibiting all coastwise traffic by British and Japanese vessels and forbidding vessels of any nationality to call at Hong-Kong; responsibility for regulations disowned by Canton Government on Aug. 26.
- June 2-13. Exchange of notes between Foreign Office at Peking and Diplomatic Corps regarding responsibility for Shanghai incidents of May 30. June 15-18, negotiations at Shanghai between representatives of Diplomatic Corps and Chinese delegates; negotiations broke down because Diplomatic delegates considered thirteen points put forward by Chinese inadmissible as a basis for discussion. June 17-24, Further exchange of notes between Peking Foreign Office and Diplomatic Corps. June 23, French Consul-General informed Canton Government that indemnity would be demanded for death of French citizen on June 23. June 26, British Minister at Peking formally protested against incident on June 23: note from Canton Government to British and French Consuls demanding compensation and surrender of Shameen to Canton. July 2, Commission, consisting of French and Italian Ministers and American chargé d'affaires at Peking, appointed to negotiate with Chinese delegates regarding Shanghai incident. July 4, Peking Government declined further discussion unless extraneous questions were also discussed. July 17, Conference of British Foreign Secretary, American, French and Japanese Ambassadors in London decided that judicial inquiry should be held into Shanghai incidents. Aug. 21, reply from Diplomatic Corps to Peking Government's note of Aug. 9, 1924, agreeing to resume negotiations for rendition of Shanghai Mixed Court. Sept. 15, Note presented to Peking Government stating that interested Powers had decided on appointment of Commission consisting of a British, an American and a Japanese judge, and expressing hope that a Chinese jurist would also be appointed. Sept. 21, Peking Foreign Office refused to appoint Chinese jurist. Oct. 7-17, Commission held inquiry. Nov. 17, report completed. Dec. 23, full summaries of findings of three judges published.
- June 6-13. Yunnanese driven from Canton by Cantonese, leaving Kuomintang in control of city. July 1, new Canton Government formed, consisting of sixteen Commissioners. By end of August non-communist members of Government expelled, leaving Government in hands of Russians and General Chang Kai-shek. Early Sept. Swatow occupied by Chen Chiung-meng's 'Anti-Red' army. Nov. 3, Cantonese forces under Chang Kai-shek recaptured Swatow.
- June 24. Peking Government sent note to Powers recapitulating claims made by Chinese delegates during Shanghai negotiations and demanding abrogation of the

- "unequal treaties". July 2, Note from U.S. Government to Powers, suggesting immediate appointment of a Mixed Commission to consider gradual abolition of extraterritoriality. Sept. 4, Powers represented at Washington Conference of 1921-2 sent identic notes in reply to Chinese note of June 24, declaring their willingness to consider conditional proposals for modification of treaties, to appoint delegates to a Tariff Conference (*see below under Aug. 19*) and to appoint a Commission in accordance with the Washington Resolution to study the extraterritoriality question. (*E. N.*, 7.11.25.) Sept. 10, Peking Government informed Diplomatic Corps that it would welcome appointment of a Commission on Extraterritoriality. Sept. 17, U.S. Government convoked Commission for Dec. 18 at Peking. Meeting of Commission subsequently postponed owing to interruption of communications between Peking and Tientsin.
- July 7. Treaties signed at Washington on Feb. 6, 1922, regarding (1) principles and policies to be followed in matters concerning China, and (2) Chinese customs tariff, ratified by French Chamber. Aug. 5, Ratifications exchanged at Washington by the nine signatory Powers.
- Aug. 19. Peking Government invited Powers to Tariff Conference to open at Peking on Oct. 26, 1925, announcing its intention of bringing up question of tariff autonomy at Conference. Aug. 28, invitation accepted by Great Britain. (*E. N.*, 7.11.25.) All Powers signatory to Washington Treaty had accepted invitation by Sept. 9. Oct. 26, Conference opened at Peking (Texts of speeches, *E. N.*, 5.12.25). Nov. 2, proposals put forward by American delegates under which, if China fulfilled certain conditions, full tariff autonomy would be granted on Jan. 1, 1929. Nov. 19, agreement reached that treaty to be signed by delegates should contain an article conceding tariff autonomy on Jan. 1, 1919, and pledging China to abolish *likin* by that date.
- Sept. 5. Peking Government submitted proposals to Japanese Government for cancellation of existing Japanese and American wireless contracts and substitution of joint action between Peking Government, Japanese and American interests in development of wireless communications in China. Sept. 18, Protests made by British and French Ministers at Peking against granting of monopolist privileges to Japan and U.S.A. Oct. 9, Note from Japanese Government to Peking Government approving Chinese proposal in principle but urging formation of international consortium including Great Britain and France. Oct. 10, Japanese Government instructed Japanese Ambassador in Washington to open conversations with a view to an agreement that China should control wireless communications and all the Powers pool their interests.
- Sept. 26. Chinese Ministry of Justice published circular accusing foreign consular officials of corrupt practices and of shielding foreigners who killed or wounded Chinese. Oct. 9, Diplomatic Corps addressed note of protest to Peking Government.
- Oct. 15. Chang Tso-lin's troops under Yang Yu-ting withdrew from Shanghai before advancing troops from Chekiang under Sun Chuan-feng, a supporter of Wu Pei-fu. Oct. 20, Nanking surrendered to Sun Chuan-feng. Oct. 21, Wu Pei-fu arrived at Hankow and issued statement that fourteen provinces had appealed to him to take action against Peking Government and against Bolshevism and Communism in China. Nov. 13, agreement reached between Chang Tso-lin and Feng Yu-hsiang for withdrawal of Chang's troops from neighbourhood of Peking. Nov. 22, Part of Chang's troops, under Kuo Sung-ling, revolted against him. Dec. 6, Kuo Sung-ling defeated Chang and began advance towards Mukden. Dec. 9, Fighting began round Tientsin between Li Ching-lin, a supporter of Chang Tso-lin, and Feng Yu-hsiang. Dec. 15, Japanese War Department announced decision of Government to send immediate reinforcements to protect South Manchurian Railway. Dec. 15 and 19, Diplomatic Corps at Peking presented notes to Chinese Foreign Office insisting on restoration of free communication between Peking and coast. Dec. 24, Tientsin occupied by Feng Yu-hsiang. Dec. 24, Chang Tso-lin defeated and captured Kuo Sung-ling; Kuo executed on Dec. 27. Dec. 26, Japanese War Department decided to withdraw additional troops from Mukden.
- Dec. 26. Mandates published in Peking appointing Hsu Shi-Ying Prime Minister and revising regulations defining functions of Provisional Government, laying it down that Cabinet should be "responsible" and devise and carry out reforms in accordance with the wishes of the people.

Colombia.

1924. Aug. 20. Treaty signed with Panama providing for establishment of an international boundary between the two countries by a Mixed Commission. Ratifications exchanged Jan. 31, 1925. (*L. N. T. S. XXXIII.*)
1925. Feb. 23. Provisional extradition agreement concluded with Panama.
- July 20. Exchange of Notes with Venezuela at Caracas regarding construction of an international bridge over River Tachira.

Cuba.

1925. March 13. United States Senate approved treaty of March 2, 1904, by which United States relinquished in favour of Cuba all claim to the Isle of Pines. Ratifications exchanged March 23.
- May 25. Extradition treaty with Mexico signed at Havana.

Czechoslovakia.

1925. Jan. 19. Ratifications exchanged of consular convention and convention concerning double taxation with Italy of March 1, 1924.
- March 6. Agreement with Poland regarding mutual judicial assistance signed at Prague.
- April 16. Convention with Rumania regarding frontier communications and property rights in frontier zone signed at Bucharest.
- April 23. Treaty for conciliation and arbitration, commercial convention, financial and other technical conventions with Poland signed at Warsaw (Text of arbitration treaty. *E. N.*, 13.6.25). Supplementary commercial agreement concluded July 3.
- May 7. Extradition and judicial assistance agreements with Rumania signed at Bucharest.
- May 26. Two agreements with France regarding air navigation and technical collaboration in aeronautical matters signed at Prague.
- July 2. Extradition convention with U.S.A. signed at Prague.
- July 6. Ratifications exchanged of Treaty of Friendship with Turkey of Oct. 11, 1924.

Danzig.

1925. Jan. 6. Polish letter-boxes installed in Danzig on Jan. 5, found disfigured.
- Feb. 4, High Commissioner announced his decision that Poland had not the right to conduct an independent postal service in the Free City. Feb. 23, Poland appealed to League of Nations Council against High Commissioner's decision.
- March 13, League Council decided to ask Permanent Court of International Justice for advisory opinion regarding Poland's right to conduct postal service. May 16, Permanent Court gave advisory opinion in favour of Poland and pointed out that practical application of its opinion depended on delimitation of port within the meaning of the Treaty of Versailles. June 11, League Council adopted Court's advisory opinion and appointed an Expert Commission to draw up proposals for delimitation of port. July 19-23, Commission's report (dated Aug. 2) forwarded by High Commissioner for Danzig to League Secretariat. (*L. N. O. J.*, Dec. 1925.)
- Sept. 19, League Council adopted Expert Commission's report and approved boundaries of port as therein defined.
- March 13. League Council asked Spanish representative to propose modifications in procedure for dealing with differences between Danzig and Poland. June 11, Council adopted proposals for new procedure under which High Commissioner for Danzig might, before giving a decision on any point at issue, consult the League's technical organizations or experts, who had formerly, as a rule, been consulted only after an appeal against a decision of the High Commissioner had been lodged with the Council.
- Sept. 19. League Council considered request from Chairman of Danzig Harbour Board regarding delimitation of Westerplatte peninsula, placed at disposal of Poland as a munitions depot by Council's decision of March 14, 1924. Council decided that Harbour Board should undertake proposed delimitation after consultation with one or two experts. Oct. 15-19, expert appointed to advise Harbour Board visited Danzig; reported on Oct. 19. Oct. 22, area attributed to Poland delimited by Harbour Board. Oct. 31, entire area handed over to Polish authorities.

Denmark.

1924. June 27. Conciliation agreements concluded with (1) Finland, (2) Norway, and (3) Sweden (*L. N. T. S. XXXIII*). Ratifications of (1) and (3) exchanged March 7, 1925 ; of (2) March 14, 1925.
- July 9. Treaty signed with Norway regarding hunting and fishing rights in East Greenland. Came into force July 10 (*L. N. T. S. XXVII*).
- Dec. 16. Air navigation agreement concluded with Poland. Ratifications exchanged Feb. 5, 1925 (*L. N. T. S. XXXII*).
- Dec. 18. Agreements concluded with Great Britain providing (1) for reciprocal exemption in certain cases from taxation of incomes derived from shipping trade, and (2) for reciprocal recognition of load line certificates. (*L. N. T. S. XXXII*).
1925. Jan. 26. Treaty of Friendship with Turkey signed at Angora.
- May 18. Ratifications exchanged of conciliation treaty with Switzerland of June 6, 1924.

Dominican Republic.

1925. Oct. 24. Ratifications exchanged of convention with U.S.A. of Dec. 27, 1924, providing for U.S. assistance in collection and application of customs revenues of Dominican Government. (*A. J. I. L.*, Jan. 1926.)

Egypt.

1925. March 16. Agreement concluded with France by exchange of notes of March 14 and 16 regarding provisional status of Libano-Syrians in Egypt.
- June 16. Agreement signed with Germany regarding jurisdiction over German nationals in Egypt.
- Dec. 6. Agreement signed with Italy for rectification of frontier between Egypt and Cyrenaica, by which oasis of Jarabub is included in Cyrenaica.

Estonia.

1924. Dec. 1. Treaty of Friendship with Turkey signed at Warsaw ; ratified by Estonia June 19, 1925.
1925. Jan. 2. Extradition convention with Finland signed at Reval.
- Jan. 17. Arbitration and conciliation convention signed at Helsingfors by Estonia, Finland, Latvia and Poland.
- Aug. 10. Arbitration treaty with Germany signed in Berlin.
- Nov. 18. Extradition treaty with Great Britain signed in London.

Finland.

1925. March 9. Convention signed with Netherlands regarding admission of Finnish consuls in Netherlands colonies.
- March 14. Conciliation and arbitration treaty with Germany signed at Berlin.
- March 23. Ratifications exchanged of extradition treaty with United States of Aug. 1, 1924.

France.

1925. Jan. 28. Agreement concluded with Great Britain by exchange of notes of Jan. 5 and 28 for reciprocal granting of facilities to British and French seamen passing through French and British territory. (*L. N. T. S. XXXIII*).
- April 6. Treaty of conciliation and arbitration concluded with Switzerland.
- June 22. Agreement with Spain regarding maritime supervision of Moroccan Coast signed at Madrid. Further conventions signed on July 8 for collaboration in Morocco for prevention of traffic in munitions and other supplies ; on July 11 for political collaboration in Morocco ; on July 21 for protection of Tangier.
- Aug. 14. Treaty signed with Germany for delimitation of frontier in accordance with Treaty of Versailles.

Germany.

1924. Dec. 30. Agreement with Poland regarding frontier traffic signed at Danzig.
1925. Jan. 24. Concordat signed between Bavaria and the Vatican. (*E. N.*, 11.4.25.)

- Jan. 31. Ratifications exchanged of agreement concluded with Poland at Vienna on Aug. 30, 1924, regarding questions of option and nationality.
- Feb. 10. Convention with Lithuania signed at Berlin, concerning execution of Arts. 8-10 of Memel Convention of May 8, 1924. Ratifications exchanged Feb. 21, 1925.
- March 12. Agreement regarding archives concluded with Poland.
- March 14. Reply from League of Nations Council to German note of Dec. 12, 1924, regarding Germany's entry into the League. (*L. N. M. S.*, March, 1925.)
- March 16. Claims convention with Mexico signed in Mexico City.
- May 29. Provisional air traffic agreement with Sweden concluded in Stockholm. Ratifications exchanged Oct. 23, 1925. (*Sver.*, 1925, No. 23.)
- July 25. Frontier traffic agreement signed with Lithuania.
- Aug. 1. Repatriation began of about 20,000 Germans expelled from Poland as, in accordance with agreement of Aug. 30, 1924, they had opted for German nationality and should have left the country by Aug. 1. Aug. 6, German Foreign Minister announced in Reichstag that Poles still remaining in Germany who had opted for Polish nationality had been given forty-eight hours notice to leave. Oct. 25, Polish Government announced decision, as result of Locarno Agreements, not to proceed with expulsion of further German optants due to leave Poland by Nov. 1, 1925.
- Oct. 12. Extradition agreement concluded with Switzerland by exchange of notes of Sept. 2 and Oct. 12, 1925.
- Nov. 21. Ratifications exchanged of conciliation and arbitration treaty with Sweden of Aug. 29, 1924. (*Sver.*, No. 28, 1925.)
- Dec. 16. Three judicial agreements concluded with Poland by exchange of notes.

Greece.

- 1925, Feb. 3. Greek National Assembly unanimously rejected protocol regarding protection of Bulgarian minorities signed at Geneva on Sept. 29, 1924.
- Feb. 11. Greek Government appealed to League of Nations against expulsion of Oecumenical Patriarch from Constantinople. March 1, Turkish Government informed League of Nations that it considered question of Patriarchate purely domestic and could not agree to intervention by the League. March 14, League Council decided to ask Permanent Court of International Justice for advisory opinion as to its competence. May 19, Patriarch Constantine VI announced his resignation. May 30, Holy Synod decided to proceed to election of new Patriarch. June 1, Greek Government withdrew its appeal to League. June 8, League withdrew its request to Permanent Court for an advisory opinion. July 13, Mgr. Basil Georgiadas elected Oecumenical Patriarch.
- Feb. 13. Negotiations began for renewal of treaty of alliance with Serb-Croat-Slovene Kingdom. June 1, negotiations broke down, owing to differences of opinion particularly regarding minority questions and the working of the Ghevgeli-Salonica railway.
- March 5. Free Zone at Salonica formally handed over to Serb-Croat-Slovene Kingdom.
- March 26. Permanent Court of International Justice gave judgment in Anglo-Greek dispute regarding Mavrommatis Palestine Concessions, dismissing Greek claim for an indemnity.
- June 21. Five agreements signed with Turkey regarding exchange of populations and rights of Greek subjects in Turkey and Turkish subjects in Greece.
- June 25. *Coup d'état* by General Pangalos; new government formed June 26.
- Oct. 18. Greek Free Zone inaugurated at Salonica.

Haiti.

- 1925, Feb. 28. Agreement signed with U.S.A. at Port-au-Prince modifying agreement of Aug. 4, 1916, regarding police.

Honduras.

- 1925, Aug. 7. Honduras agreed to arbitration by United States in boundary dispute with Nicaragua.

Hungary.

- 1925, March 24. Ratifications exchanged of extradition convention with Rumania of April 16, 1924.

May 13. Ratifications exchanged of treaty of conciliation and arbitration with Switzerland of June 18, 1924.

June 28. Protocol signed by Mixed Hungarian-Rumanian Commission completing delimitation of frontier.

Iraq.

1925, March 21. Constitution promulgated.

March 23. Commission of Inquiry into question of frontier between Iraq and Turkey, appointed by League of Nations Council on Sept. 30, 1924, left Mosul. Aug. 7, Commission's report issued. Sept. 2, Session of League of Nations Council opened in Geneva. Sept. 4, after hearing views of interested parties on Commission's report, Council appointed sub-committee to consider preliminary questions involved. Sept. 15, British representatives lodged formal protest against Turkish treatment of Christian communities north of Mosul frontier, in territory between Brussels line and frontier claimed by Iraq. Sept. 20, Council decided to ask Permanent Court of International Justice for advisory opinion on two legal points. Sept. 22, British representative asked Council to undertake immediate inquiry on the spot into Turkish treatment of Christians in neighbourhood of Brussels line. Sept. 24, Council decided to send representative to Mosul. Sept. 28, General Laidoner appointed Commissioner to investigate situation. Oct. 30, General Laidoner arrived at Mosul. Nov. 21, Permanent Court gave advisory opinion that Council's decision would be binding on the parties and would constitute a definitive determination of the frontier between Turkey and Iraq, and that decision must be unanimous, votes of representatives of the two parties not being counted in ascertaining unanimity. Dec. 8, League Council adopted Court's advisory opinion. Turkish delegate declared his Government would not be bound by Court's opinion and would not recognize League's arbitral decision. Dec. 10, General Laidoner submitted his report to Council. Dec. 12, attempt by Mosul sub-committee to secure settlement by conciliation failed. Dec. 16, League Council gave arbitral decision that Brussels line should become definitive northern frontier of Iraq on conclusion within six months of new treaty between Great Britain and Iraq ensuring continuance of British mandate for another twenty-five years, unless Iraq within that period became a Member of the League.

Italy.

1925, Jan. 29. Ratifications exchanged of arbitration treaty with Switzerland of Sept. 20, 1924.

May 1. Ratifications exchanged of treaty with Great Britain of July 15, 1924, regarding cession to Italy of part of province of Jubaland. June 29, territory formally transferred.

June 15. Agreement concluded with Great Britain by exchange of notes of June 12 and 15 regarding utilization of the waters of the River Gash for irrigation in the Sudan. [*Cmd.* 2472.]

July 1. Agreement concluded with Switzerland by exchange of notes of June 27 and July 1, regarding marriage certificates for Italian nationals in Switzerland.

Japan.

1924, Dec. 26. Treaty for judicial settlement of disputes concluded with Switzerland at Tokio.

1925, Jan. 20. Treaty embodying general principles for resumption of relations between the two countries signed with the U.S.S.R. (*A. J. I. L.*, April, 1925; *L. N. T. S.*, XXXIV.) April 4, Withdrawal of Japanese troops in occupation of N. Sakhalin completed in accordance with terms of treaty. May 15, Protocols signed and Russian Consulate at Alexandrovsk opened, thus completing transfer of Sakhalin to Soviet Russia.

Dec. 15. Contracts signed with U.S.S.R. in accordance with treaty of Jan. 20, 1925, for oil concessions to Japan for forty-five years in southern part of Sakhalin.

Latvia.

1925, Jan. 3. Treaty of friendship with Turkey signed at Warsaw.

March 28. Conciliation convention with Sweden concluded at Riga. Ratifications exchanged Sept. 24, 1925. (*Sver.*, 1925, No. 22.)

May 1. Arbitration, sanitary, fishing and navigation conventions concluded with Lithuania at Riga.

July 1. Protocol signed with Lithuania regarding conclusion of conciliation and arbitration and commercial conventions.

July 7. Ratifications exchanged of extradition treaty with Great Britain of July 16, 1924.

League of Nations.

1925, April 1-8. Preliminary session held at Geneva of committee of experts appointed by League Council in Dec., 1924, to consider progressive codification of international law. Ten sub-committees appointed to study certain subjects and report by Oct. 15, 1925.

Lithuania.

1925, Aug. 25. Ratifications deposited by France, Great Britain, Italy and Japan of Memel Convention of May 8, 1924.

Sept. 15. Protocol signed by Polish-Lithuanian Conference at Copenhagen recording agreement on questions regarding traffic on the Niemen, postal communications, and residence and travel by nationals of one country in the other country.

Mexico.

1925, Jan. 6. Special Commission appointed to consider equitable use of waters of Rio Grande as between Mexico and U.S.A.

Aug. 28. Officially announced that British and Mexican Governments had decided on procedure for renewal of full diplomatic relations.

Sept. 2. Announced that agreement had been reached for submission to Mixed Commission of British claims arising from revolutionary disturbances.

Nejd.

1925, Nov. 1. Agreement (Bahra Agreement) signed by Sir Gilbert Clayton with Ibn Saud at Bahra regarding tribal raids between Iraq and Nejd. (*T.*, 29.12.25; *L'Orient Moderne*, Jan., 1926.) Nov. 2, Further agreement (Haddah Agreement) signed regarding frontiers, tribal raids, &c., between Nejd and Transjordan. (*L'Orient Moderne*, Jan., 1926.)

Netherlands.

1925, Jan. 7. Ratifications exchanged of provisional air navigation agreement with Great Britain of July 11, 1923. [*Cmd.* 2338.]

Jan. 23. Agreement concluded with U.S.A. for arbitration of differences respecting sovereignty over Island of Palmas. Ratifications exchanged April 1, 1925.

July 12. Agreement concluded with Great Britain by exchange of notes for prolongation for five years of arbitration convention of Feb. 15, 1905. [*Cmd.* 2504.]

July 18. Ratifications exchanged of treaty of friendship with Turkey of Aug. 16, 1924.

Nicaragua.

1924, Oct. 30. Resolution passed by Nicaragua setting up British-Nicaraguan Mixed Claims Commission to settle claims arising from Harrison-Altamirano Treaty. Commission held first meeting Dec. 22, 1924.

Norway.

1925, May 13. Agreement concluded with Great Britain by exchange of notes renewing arbitration convention of Aug. 11, 1904. [*Cmd.* 2452.]

Aug. 14. Norwegian sovereignty over Spitzbergen officially proclaimed. Name changed to Svalbard.

Aug. 21. Conciliation treaty concluded with Switzerland at Oslo. (*F. F.*, 25.11.25.)

Oct. 23. Exchange of notes with Sweden regarding prolongation and interpretation of arbitration convention of Oct. 28, 1908. (*Sver.*, 1925, No. 26.)

Panama.

1925, Oct. 12. Government of Panama asked for U.S. military intervention owing to riots in Panama City. U.S. troops withdrawn Oct. 23.

Permanent Court of International Justice.

1925, Jan. 12-March 26. Sixth (extraordinary) session held. Feb. 21, Advisory opinion given on interpretation of Article 2 of Convention of Lausanne (Jan. 30,

- 1923) regarding exchange of Greek and Turkish populations. March 26, Judgment given in affair of Mavrommatis Palestine Concessions. March 26, Judgment given regarding interpretation of Court's judgment of Sept. 12, 1924, in Graeco-Bulgar dispute regarding interpretation of Treaty of Neuilly.
- April 14-May 16. Seventh (extraordinary) session held. May 16, advisory opinion given on questions concerning Polish postal service at Danzig.
- June 15-Aug. 25. Eighth session held. Aug. 25, Judgment delivered on objections raised by Poland to Court's jurisdiction in case concerning certain German interests in Upper Silesia.
- Oct. 22-Nov. 21. Ninth (extraordinary) session held. Nov. 21 advisory opinion given on questions concerning decision by League Council of frontier dispute between Iraq and Turkey.

Persia.

- 1925, Oct. 31. Mejlis proclaimed deposition of Kajar Dynasty from sovereignty and entrusted temporary government to Riza Khan Pahlevi pending final decision as to future form of government. Dec. 6, newly elected Mejlis met to decide on form of government. Dec. 13, Mejlis elected Riza Khan as Shah.

Poland.

- 1925, Feb. 10. Concordat with Vatican signed at Rome. Ratifications exchanged June 2, 1925.
- March 7. Arbitration and conciliation agreement concluded with Switzerland.
- Nov. 3. Arbitration treaty with Sweden signed at Stockholm.

Portugal.

- 1925, May 19. Exchange of notes with Great Britain at Lisbon regarding cancellation of British concession of Chinde and Portuguese concession of Chipoli. [*Cmd.* 2457.]
- Aug. 29. Agreement concluded with Great Britain by exchange of notes prolonging till Nov. 16, 1926, arbitration agreement of Nov. 16, 1914. [*Cmd.* 2516.]

Reparation.

- 1924, Nov. 22. Protocol signed at Paris by Belgium, France, Great Britain, Italy, Japan and Serb-Croat-Slovene Kingdom amending Paragraph 13 of Annex II to Part VIII of Treaty of Versailles. [*Cmd.* 2313.]
- 1925, Sept. 21. Agreement signed in Paris by Belgium, U.S.A., France, Great Britain, Italy, Japan, Brazil, Greece, Poland, Portugal, Rumania, Serb-Croat-Slovene State and Czechoslovakia to regulate the amounts to be allocated out of the second Dawes Annuity for the armies of occupation in the Rhineland, the Inter-Allied Rhineland High Commission and the Inter-Allied Military Commission of Control in Germany. [*Cmd.* 2558.]

Rumania.

- 1925, June 3. Transit conventions signed with Serb-Croat-Slovene Kingdom.

Salvador.

- 1924, Nov. 7. Arbitration treaty with Uruguay signed at Madrid. Ratified by Uruguay, April 3, 1925; by Salvador May 28, 1925.

Security.

- 1925, Oct. 5-16. Conference held at Locarno, attended by representatives of Belgium, Czechoslovakia, France, Germany, Great Britain, Italy and Poland. Oct. 16, Final Protocol of Conference signed and following instruments initialled: treaty between Belgium, France, Germany, Great Britain and Italy (Rhineland Pact); arbitration convention between Belgium and Germany; arbitration convention between France and Germany; arbitration treaty between Poland and Germany; arbitration treaty between Czechoslovakia and Germany; Collective note from France, Great Britain and Italy to Germany regarding interpretation of article 16 of Covenant of League of Nations; Treaty of Alliance between France and Poland; Treaty of Alliance between France and Czecho-slovakia. [*Texts: Cmd.* 2525.]
- Dec. 1. Locarno treaties signed in London.

Serb-Croat-Slovene Kingdom.

- 1925, Oct. 28. Treaty of peace and friendship with Turkey signed at Angora.

Siam.

- 1925, July 14. Treaty regarding jurisdiction signed with Great Britain.
 Nov. 25. Arbitration convention with Great Britain signed in London.

Spain.

- 1925, July 6. Ratifications exchanged of treaty of friendship with Turkey of Sept. 27, 1924.
 Dec. 3. General Primo de Rivera, Marquis de Estella, announced dissolution of Military Directory and creation of Cabinet with himself as Prime Minister.

Sweden.

- 1925, Feb. 14. Ratifications exchanged of conciliation treaty with Switzerland of June 2, 1924. (*Sver.*, 1925, No. 1.)
 March 18. Ratifications exchanged of arbitration convention with U.S.A. of June 24, 1924. (*Sver.*, No. 5, 1925.)
 June 6. Ratifications exchanged of treaty of friendship with Turkey of May 31, 1924.

Switzerland.

- 1925, Sept. 19. Treaty of friendship with Turkey signed at Geneva. Provisional commercial agreement concluded by exchange of notes.

Tangier.

- 1925, June 1. Régime established by convention of Dec. 18, 1923, came into force.

Turkey.

- 1925, March 22. Turkish Government presented note to Allied missions, asking that Embassies and Legations be moved from Constantinople to Angora.
 April 20. Arbitral decision deposited with League of Nations by Professor Borel regarding distribution of Ottoman Debt among successor states of Ottoman Empire. July 1, Commission instituted by Treaty of Lausanne to arrange for distribution of annuities met in Paris.
 Dec. 17. Treaty concluded with U.S.S.R. in Paris binding each party not to attack the other and to remain neutral in case of attack by a third party. (*T.*, 29.12.25.)

United States.

- 1925, Sept. 25. Agreement concluded with Great Britain by exchange of notes regarding interference by wireless stations on board ship with broadcasting stations on shore.

GENERAL INTERNATIONAL AGREEMENTS.¹

AERIAL NAVIGATION : Convention and Protocols—(1) Convention, Paris, Oct. 13, 1919 ; (2) Additional Protocol, Paris, May 1, 1920 ; (3) Protocol regarding modification of Art. 5 of 1919 Convention, London, Oct. 27, 1922 ; (4) Protocol amending Art. 34, London, June 30, 1923.

Ratifications : Great Britain (3), Dec. 19, 1923, (4), Nov. 20, 1924 ; Japan (1, 2), Aug. 4, 1925 ; Persia (3) ; Poland (1, 2), Nov. 26, 1924.

Denunciation : Bolivia (1), Aug. 30, 1924.

AGRICULTURE : Creation of an International Institute of, at Rome. (Rome, May 28, 1905.)

Declaration that convention is binding : Hungary, Dec. 7, 1925.

¹ The place and date of signature are given in brackets. The date given for ratification is that of deposit except when indicated thus : * when the date given, so far as is known, is that of ratification only.

ARBITRATION CLAUSES : Recognition of validity in commercial matters—Protocol. (Geneva, Sept. 24, 1923.)

Signatures : Brazil ; France ; Greece ; Italy ; Lithuania ; Newfoundland, June 22, 1925 ; Panama ; Poland ; Siam, May 19, 1925 ; Uruguay.

Ratifications : British Empire ; Denmark, April 6, 1925 ; Netherlands and Dutch East Indies, Surinam and Curacao, Aug. 6, 1925 ; Newfoundland ; Rumania, March 12, 1925.

Accession : Southern Rhodesia, Dec. 18, 1924.

ARMS AND AMMUNITION : Convention and Protocols. (Geneva, June 17, 1925.) (1)

* Convention for the supervision of the international trade in arms and ammunition and in instruments of war ; (2) Statement regarding the Territory of Ifni ; (3) Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of war ; (4) Protocol of signature.

Signatures : Abyssinia (1-4) ; Austria (1-4), July 24, 1925 ; Brazil (1-4) ; British Empire (1-4) ; Canada (1-4) ; Chile (1-4) ; Czechoslovakia (1-4) ; Denmark (3) ; Estonia (1-4) ; Finland (1-4) ; France (1-4) ; Germany (1, 3, 4), July 6, 1925 ; Hungary (1, 4) ; India (1-4) ; Italy (1-4) ; Japan (1-4) ; Latvia (1-4) ; Lithuania (3) ; Luxembourg (1-4) ; Netherlands (3, 4) ; Nicaragua (1, 3, 4) ; Poland (1-4) ; Portugal (3, 4) ; Rumania (1-4) ; Salvador (1-4) ; Serb-Croat-Slovene Kingdom (1-4) ; Spain (1-4) ; Switzerland (3, 4) ; Turkey (3, 4) ; United States of America (1, 3, 4) ; Uruguay (1, 3, 4).

Accession : Liberia (1), July 30, 1925.

CENTRAL AMERICAN TREATIES. (Washington, Feb. 7, 1923.) (1) Commissions of Inquiry ; (2) Disarmament ; (3) Tribunal ; (4) Agricultural Experiment Stations ; (5) Electoral Legislation ; (6) Extradition ; (7) Free Trade ; (8) Labour Laws ; (9) Peace and Amity ; (10) Students Exchange.

Ratifications : Costa Rica * (1-3) ; Guatemala * (1, 2, 5, 6, 7, 10) ; Honduras * (1, 2, 3, 4, 8, 9, 10) ; Nicaragua * (1-3) ; Salvador * (2, 6) ; United States of America * (1).

COMMERCIAL STATISTICS : Convention. (Dec. 31, 1913.)

Accession : Netherlands, March 11, 1925.

COMMUNICATIONS AND TRANSIT : Conventions. (Barcelona, April 29, 1921.) (1) Freedom of transit (convention and statute) ; (2) Navigable waterways (convention, statute and additional protocol) ; (3) Right to a flag of states having no sea-coast.

Ratifications : Estonia (1), June 6, 1925 ; Japan (1, 3), Feb. 20, 1924 ; Greece (1), Feb. 18, 1924 ; Latvia (3), Feb. 12, 1924 ; Poland (3), Dec. 20, 1924 ; Sweden (1, 3), Jan. 19, 1925.

Accession : Danzig (1), April 3, 1925.

— Conventions. (Geneva, Dec. 9, 1923.) (1) International régime of railways (convention, statute and protocol of signature) ; (2) International régime of maritime ports (convention, statute and protocol of signature) ; (3) Transmission in transit of electric power (convention, statute and protocol of signature) ; (4) Development of hydraulic power affecting more than one state (convention and protocol of signature).

Ratifications : India (1, 2), April 1, 1925 ; New Zealand (1-4), April 1, 1925 ; Siam (1), Jan. 9, 1925.

Accessions : Australia (2), June 29, 1925 ; British Colonies (1-4), Sept. 22, 1925 ; China (1), Jan. 21, 1925 ; France (1, 2), Dec. 1, 1924 ; Malta (2), Nov. 7, 1925 ; Newfoundland (1-4), April 28, 1925 ; Panama (1, 2—ad referendum), July 31, 1925 ; Southern Rhodesia (1-4), April 28, 1925.

CUSTOMS FORMALITIES : Convention. (Geneva, Nov. 3, 1923.)

Ratifications : Australia, March 13, 1925 ; Egypt, March 23, 1925 ; Germany, Aug. 1, 1925 ; India, March 13, 1925 ; Netherlands and Dutch East Indies, Surinam and Curacao, May 30, 1925 ; Siam, May 19, 1925.

Accession : Persia, May 8, 1925.

CUSTOMS TARIFF : Publication—Convention. (Brussels, July 5, 1890.)

Ratifications : Australia, March 13, 1925 ; India, March 13, 1925 ; Egypt, March 23, 1925 ; Netherlands, May 30, 1925 ; Siam, May 19, 1925.

Accession : Persia, May 8, 1925.

EPIZOOTIC OFFICE : Creation of—Convention. (Paris, Jan. 25, 1924.)

Ratifications : Czechoslovakia, June 20, 1925 ; Denmark, Jan. 21, 1925 ; Finland, Jan. 23, 1925 ; Great Britain, July 11, 1925 ; Mexico *, Dec. 31, 1924 ; Monaco, March 3, 1925 ; Morocco *, Dec. 20, 1924 ; Poland, Feb. 18, 1925.

GAUGING OF TONNAGE OF VESSELS : Unification of system of, on inland waterways of Europe—Convention. (Paris, Nov. 1925.)

Signatures : Belgium ; Czechoslovakia ; Germany ; Hungary ; Italy ; Netherlands ; Poland ; Rumania ; Serb-Croat-Slovene Kingdom ; Union of Soviet Socialist Republics.

HAGUE CONVENTIONS. (The Hague, Oct. 18, 1907.) (1) Pacific settlement of disputes ; (2) Limitation of armed force in recovery of contracted debts ; (3) Opening of hostilities ; (4) Laws of land warfare ; (5) Neutrals in land warfare ; (6) Status of enemy merchant ships ; (7) Conversion of merchant ships ; (8) Submarine mines ; (9) Bombardments ; (10) Geneva convention in naval war ; (11) Right of capture ; (12) Establishment of an international prize court ; (13) Neutral powers in naval war ; (14) Projectiles and explosives.

Accession : Poland (3, 4, 5), May 7, 1925.

Denunciation : Great Britain (6), Nov. 14, 1925.

INDUSTRIAL PROPERTY : Designs or Models—Arrangement concerning the international registration of (The Hague, Nov. 6, 1925).

Signatures : Belgium ; Danzig ; France ; Germany ; Netherlands ; Portugal ; Spain ; Switzerland ; Syria and Lebanon ; Tunisia.

— **False Indications of Origin of Goods—Convention.** (Madrid, April 14, 1891 ; Revision : Washington, June 2, 1911.)

Accessions : Germany, June 12, 1925 ; Latvia, July 6, 1925 ; Turkey, Oct. 10, 1925.

Denunciation : Latvia, Dec. 21, 1925.

— — **Revised Convention.** (The Hague, Nov. 6, 1925.)

Signatures : Brazil ; Cuba ; Czechoslovakia ; Danzig ; France ; Germany ; Great Britain and Northern Ireland ; Morocco ; Portugal ; Spain ; Switzerland ; Syria and Lebanon ; Tunisia.

— **Protection—Convention.** (Paris, March 20, 1883 ; Revisions : Brussels, Dec. 14, 1900 ; Washington, June 2, 1911.)

Accessions : Australia, Oct. 10, 1925 ; Canada, April 22, 1925 ; Irish Free State, Dec. 4, 1925 ; Latvia, July 6, 1925 ; Turkey, Oct. 10, 1925.

— — **Revised Convention.** (The Hague, Nov. 6, 1925.)

Signatures : Australia ; Austria ; Belgium ; Brazil ; Canada ; Cuba ; Czechoslovakia ; Danzig ; Denmark ; Dominican Republic ; Estonia ; Finland ; France ; Germany ; Great Britain and Northern Ireland ; Hungary ; Italy ; Japan ; Mexico ; Morocco ; Netherlands ; Norway ; Poland ; Portugal ; Serb-Croat-Slovene State ; Spain ; Sweden ; Switzerland ; Syria and Lebanon ; Tunisia ; United States of America.

— **Trade Marks Registration—Convention.** (Madrid, April 14, 1891 ; Revisions : Brussels, Dec. 14, 1900 ; Washington, June 2, 1911.)

Ratification : Mexico, March 13, 1925.

Accessions : Germany, March 21, 1925 ; Latvia, July 6, 1925 ; Turkey, Oct. 10, 1925.

Denunciation : Latvia, Dec. 21, 1925.

— — **Revised Convention.** (The Hague, Nov. 6, 1925.)

Signatures : Austria ; Belgium ; Brazil ; Cuba ; Czechoslovakia ; Danzig ; France ; Germany ; Hungary ; Italy ; Mexico ; Morocco ; Netherlands ; Portugal ; Serb-Croat-Slovene Kingdom ; Spain ; Switzerland ; Tunisia.

LABOUR : Draft Conventions. (Washington, Nov. 28, 1919.) (1) Limitation of hours of work ; (2) Unemployment ; (3) Employment of women before and after childbirth ; (4) Night-work of young persons employed in industry ; (5) Minimum age for admission of children to industrial employment ; (6) Night-work of women.

Ratifications : Chile (1, 3, 4, 5), Sept. 15, 1925 ; France (2, 4), Aug. 25, 1925, (6), May 14, 1925 ; Germany (2), June 6, 1925 ; Irish Free State (2, 4, 5, 6), Sept. 4, 1925 ; Italy (1), Oct. 6, 1924 ; Latvia (1), Aug. 15, 1925 ; South Africa (1), Feb. 20, 1924.

- Draft Conventions. (Genoa, June 15–July 10, 1920.) (1) Minimum age for admission of children to employment at sea ; (2) Unemployment indemnity in case of loss or foundering of the ship ; (3) Facilities for finding employment for seamen.
 Ratifications : Australia (3), Aug. 3, 1925 ; Belgium (1–3), Feb. 4, 1925 ; Bulgaria (1), March 6, 1925 ; Finland (1), Oct. 10, 1925 ; Germany (3), June 6, 1925 ; Greece (1–3), Dec. 16, 1925 ; Irish Free State (1), Sept. 4, 1925 ; Netherlands (1), March 26, 1925 ; Rumania (2, 3), April 28, 1925.
- Draft Conventions. (Geneva, Oct. 25–Nov. 19, 1921.) (1) Minimum age for admission of children to employment in agriculture ; (2) Rights of association in agriculture ; (3) Workmen's compensation in agriculture ; (4) Use of white lead in painting ; (5) Application of the weekly rest in industry ; (6) Minimum age for admission of young persons to employment as trimmers and stokers ; (7) Compulsory medical examination of children and young persons employed at sea.
 Ratifications : Chile (2, 3, 4, 5), Sept. 15, 1925 ; Finland (6, 7), Oct. 10, 1925 ; Germany (2, 3), June 6, 1925 ; Irish Free State (1), May 26, 1925 ; Rumania (1, 2, 3, 4), April 28, 1925 ; Sweden (6, 7), July 14, 1925.
- Amendment to Article 303 of the Treaty of Versailles and to corresponding articles of other Treaties of Peace, adopted by the International Labour Conference at its fourth session. (Geneva, Nov. 2, 1922.)
 Ratifications : Bulgaria, March 6, 1925 ; China ; Cuba, Sept. 7, 1925 ; France, June 2, 1925 ; Germany, June 6, 1925 ; Haiti, Nov. 2, 1925 ; Hungary, May 14, 1925 ; Irish Free State, June 26, 1925 ; Japan, May 11, 1925 ; Latvia, March 16, 1925 ; Paraguay ; Poland, Feb. 10, 1925.
- LEAGUE OF NATIONS : Amendments to Articles 4, 6, 12, 13, 15, 16, 26 of Covenant—Protocols. (Geneva, Oct. 5, 1921.)
 Signatures : Brazil (Art. 16), Oct. 15, 1925 ; Portugal (Art. 16), Oct. 30, 1925.
 Ratifications : Greece (Art. 16—additional paragraphs), Jan. 20, 1925 ; Haiti (Arts. 4, 6, 12, 13, 15, 26), Nov. 2, 1925 ; Lithuania (Arts. 4, 6—last paragraph—12, 13, 15, 16, 26), March 13, 1925 ; Venezuela (Arts. 4, 6—annex and last paragraph—12, 13, 15, 26), March 24, 1925.
- Amendment to Article 16 of the Covenant. (Geneva, Sept. 27, 1924.)
 Signatures : Albania ; Brazil ; Bulgaria ; Canada ; Cuba, Feb. 20, 1925 ; Estonia ; Netherlands ; New Zealand ; Poland ; Salvador, June 3, 1925 ; Siam, May 19, 1925 ; South Africa, June 30, 1925.
 Ratifications : Rumania, March 12, 1925 ; Salvador, June 4, 1925 ; Siam, Sept. 30, 1925.
- Amendment to second paragraph of original text of Art. 16 of the Covenant—Protocol. (Geneva, Sept. 21, 1925.)
 Signatures : Albania ; Brazil ; Bulgaria ; Denmark ; Dominican Republic ; Estonia ; Netherlands ; New Zealand ; Norway ; Portugal ; Siam ; Uruguay.
- LITERARY AND ARTISTIC WORKS : Protection of—Additional Protocol. (March 20, 1914.)
 Accession : Lebanon and Syria, March 28, 1925.
- LOCUSTS : Convention. (Rome, Oct. 31, 1920.)
 Ratification : Uruguay *, June 3, 1925.
- MARITIME CONVENTIONS. (Brussels, Oct. 1922 and Oct. 1923.) (1) Unification of certain rules regarding limitation of responsibility of shipowners ; (2) Unification of certain rules regarding maritime privileges and mortgages ; (3) Unification of certain rules regarding bills of lading.
 Signatures : Belgium (1–3) ; Brazil (1–2) ; France (1–3), Feb. 28, 1925 ; Great Britain (1, 3) ; Rumania (1–3.)
- MATCHES : White Phosphorous—Convention. (Berne, Sept. 26, 1906.)
 Accessions : Hungary, Nov. 19, 1925 ; Palestine, Sept. 17, 1925.
- MONETARY CONVENTION. (Paris, Nov. 6, 1885.)
 Denunciation : Belgium, Dec. 28, 1925.
- OBSCENE PUBLICATIONS : Repression—Convention. (Paris, May 4, 1910.)
 Ratifications : Austria, Jan. 12, 1925 ; Germany, May 11, 1925 ; Monaco, May 11, 1925.

— Convention. (Geneva, Sept. 12, 1923.)

Ratifications : Austria, Jan. 12, 1925 ; Finland, June 29, 1925 ; Germany, May 11, 1925 ; Latvia, Oct. 7, 1925 ; Monaco, May 11, 1925 ; Spain, Dec. 19, 1924.

OPIUM : Convention. (The Hague, Jan. 23, 1912.) (1) Convention ; (2) Protocol regarding putting the Convention into force.

Signatures : Costa Rica (2), July 29, 1925 ; Iraq (1), Oct. 20, 1924 ; Mexico (2), May 8, 1926 ; Monaco (2), May 26, 1925 ; Switzerland (2), Jan. 15, 1925.

Ratifications : Albania, Feb. 3, 1925 ; Mexico, April 2, 1925 ; Monaco, Feb. 20, 1925 ; Switzerland, Jan. 15, 1925.

— First Conference. (Geneva, Feb. 11, 1925.) (1) Agreement ; (2) Protocol ; (3) Final Act of Conference.

Signatures : British Empire (1-3) ; France (1-3) ; India (1-3) ; Japan (1-3) ; Netherlands (1-3) ; Portugal (1-3) ; Siam (1-3).

— Second Conference. (Geneva, Feb. 19, 1925.) (1) Convention ; (2) Protocol ; (3) Final Act of Conference.

Signatures : Albania (1, 2) ; Australia (1, 2) ; Austria (1-3) ; Belgium (1-3) ; Brazil (1, 3), March 4, 1925 ; British Empire (1, 2) ; Bulgaria (1-3), July 29, 1925 ; Canada (1, 2) ; Chile (1, 2) ; Cuba (1, 2) ; Czechoslovakia (1-3), March 14, 1925 ; Denmark (1-3) ; France (1-3) ; Germany (1, 2) ; Greece (1, 2) ; Hungary (1-3) ; India (1-3), Aug. 11, 1925 ; Irish Free State (1, 3), April 3, 1925 ; Japan (1, 2) ; Latvia (1, 2), June 8, 1925 ; Luxembourg (1, 2) ; Netherlands (1, 2) ; New Zealand (1, 2) ; Nicaragua (1, 2), May 7, 1925 ; Persia (1, 2) ; Poland (1) ; Portugal (1, 2) ; Serb-Croat-Slovene Kingdom (1-3), March 9, 1925 ; Siam (1, 2) ; South Africa (1, 2), June 30, 1925 ; Spain (1), May 6, 1925 ; Sudan (1-3), May 11, 1925 ; Switzerland (1, 3), July 18, 1925 ; Uruguay (1, 3), March 2, 1925.

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES : Protocol. (Geneva, Oct. 2, 1924.)

Signatures : Haiti, June 4, 1925 ; Liberia ; Spain, Dec. 8, 1924 ; Uruguay, Dec. 5, 1924.

Ratification : Czechoslovakia *, Oct. 28, 1924.

PAN-AMERICAN CONVENTIONS. (Santiago, May 3, 1923.) (1) Arbitration ; (2) Trade-marks ; (3) Merchandise classification ; (4) Customs documents.

Ratifications : Haiti (1-4), June 22, 1925 ; Salvador * (3-4), March 7, 1925 ; Venezuela * (1), June 6, 1925.

PAN-AMERICAN SANITARY CODE. (Havana, Nov. 14, 1924.)

Ratifications : Costa Rica *, June 18, 1925 ; Cuba, June 26, 1925 ; United States, April 13, 1925.

PERMANENT COURT OF INTERNATIONAL JUSTICE. (Geneva, Dec. 16, 1920.) (1) Protocol ; (2) Optional Clause.

Ratifications : Hungary (1), Nov. 20, 1925 ; Latvia (1), Feb. 12, 1924.

POSTAL : Pan-American Conventions. (Buenos Ayres, Sept. 15, 1921.) (1) Principal convention ; (2) Parcel post ; (3) Money orders.

Ratifications : Chile (1-3), March 18, 1925 ; Nicaragua (1-3), Nov. 30, 1924 ; Panama (1-3), Feb. 27, 1925 ; Venezuela (1), March 27, 1924.

— Radio-Telegraph Convention—Revision. (London, July 5, 1912.)

Accessions : Albania, July 2, 1925 ; French Somaliland, Oct. 23, 1925 ; Lithuania, Jan. 24, 1925 ; Tanganyika, March 5, 1924.

— Telegraph Convention. (St. Petersburg, July 22, 1875 ; Revision : Lisbon, June 11, 1908.)

Accessions : Colombia ; Southern Rhodesia, June 3, 1925 ; Tanganyika, June 3, 1925.

— Universal Postal Union. (Madrid, Nov. 30, 1920.)

(1) Universal postal convention ; (2) Letters, &c., of declared value ; (3) Money orders ; (4) Parcel post ; (5) Payment on delivery ; (6) Postal subscriptions to newspapers ; (7) Postal transfers.

Ratifications : Chile (1), Jan. 23, 1925 ; Iraq (1), July 12, 1924.

Accession : Nyasaland (1), April 9, 1925.

— — Revised Conventions. (Stockholm, Aug. 28, 1924.) (1) Universal Postal Convention ; (2) Letters and parcels of declared value ; (3) Parcel post ; (4) Postal orders ; (5) Payment on delivery ; (6) Subscriptions to periodicals.

Signatures : Albania (1-6) ; Argentina (1, 2, 3, 4, 6) ; Australia (1) ; Austria (1-6) ; Belgian Congo (1-3) ; Belgium (1-6) ; Bolivia (1-6) ; Brazil (1-3) ; Bulgaria (1, 2, 3, 4, 6) ; Canada (1) ; Chile (1-6) ; China (1-4) ; Colombia (1, 2, 3, 4, 6) ; Costa Rica (1-3) ; Cuba (1-6) ; Czechoslovakia (1-6) ; Danzig (1-6) ; Denmark (1-6) ; Dominican Republic (1-3) ; Ecuador (1-3) ; Egypt (1-6) ; Estonia (1, 2, 3, 4, 6) ; Ethiopia (1-4) ; Finland (1, 2, 3, 4, 6) ; France (1-6) ; French Colonies and Protectorates (1-6) ; Germany (1-6) ; Great Britain (1, 2) ; various British Colonies and Protectorates (1, 2) ; Greece (1-6) ; Guatemala (1-3) ; Haiti (1-3) ; Honduras (1, 2, 3, 4, 6) ; Hungary (1-6) ; Iceland (1-5) ; India (1-3) ; Irish Free State (1, 2) ; Italy (1-6) ; Italian Colonies (1-6) ; Japan (1-4) ; Japanese Dependencies (1-4) ; Latvia (1-6) ; Liberia (1-4) ; Lithuania (1-6) ; Luxembourg (1-6) ; Mexico (1) ; Morocco (1-6) ; Morocco-Spanish Zone (1-6) ; New Zealand (1, 2) ; Netherlands (1-6) ; Netherlands Colonies (1-6) ; Nicaragua (1-4) ; Norway (1-6) ; Panama (1-4) ; Paraguay (1-4) ; Persia (1-3) ; Peru (1-4) ; Poland (1-6) ; Portugal (1-6) ; Portuguese Colonies (1-6) ; Rumania (1-6) ; Saar Basin (1-6) ; Salvador (1-3) ; San Marino (1-6) ; Serb-Croat-Slovene Kingdom (1-6) ; Siam (1-4) ; South Africa (1) ; Spain (1-6) ; Spanish Colonies (1-6) ; Sweden (1-6) ; Switzerland (1-6) ; Tunisia (1-6) ; Turkey (1-6) ; Union of Soviet Socialist Republics (1-4) ; United States of America (1) ; U.S. insular possessions and Philippine Islands (1) ; Uruguay (1, 3, 4, 6) ; Venezuela (1-6).

Ratifications : Austria, Aug. 24, 1925 ; Belgium and Belgian Congo, Aug. 26, 1925 ; Bolivia *, Sept. 17, 1925 ; Brazil *, May 20, 1925 ; Bulgaria *, June 2, 1925 ; Canada *, Nov. 12, 1924 ; China *, Aug. 27, 1925 ; Denmark *, Aug. 28, 1925 ; Ecuador *, Sept. 1, 1925 ; Estonia, Aug. 22, 1925 ; Finland *, Aug. 4, 1925 ; France *, Sept. 1, 1925 ; Germany, Aug. 3, 1925 ; Great Britain *, July 15, 1925 ; various British Colonies and Protectorates *, Sept. 28, 1925 ; Hungary *, July 27, 1925 ; Iceland *, Aug. 28, 1925 ; India *, Aug. 21, 1925 ; Irish Free State *, Aug. 28, 1925 ; Luxembourg *, Sept. 1, 1925 ; Mexico, Feb. 20, 1925 ; Morocco *, March 14, 1925 ; Netherlands *, April 28, 1925 ; Netherlands Colonies *, April 28, 1925 ; New Zealand *, July 2, 1925 ; Norway *, Feb. 27, 1925 ; Portugal *, Nov. 14, 1925 ; Saar Basin *, Aug. 19, 1925 ; Siam *, May 13, 1925 ; Spain, Sept. 21, 1925 ; Sweden *, June 6, 1925 ; Switzerland, Aug. 24, 1925 ; Tunisia, June 2, 1925 ; Union of Soviet Socialist Republics *, Aug. 31, 1925 ; United States *, March 24, 1925 ; U.S. insular possessions and Philippine Islands *, March 24, 1925.

PUBLIC HEALTH OFFICE : Convention. (Rome, Dec. 9, 1907.)

Accessions : Netherlands East Indies ; New Zealand.

RAILWAY TRANSPORT : Conventions. (Berne, Oct. 23, 1924.) (1) Goods traffic ; (2) Transport of passengers and luggage.

Signatures : Austria (1, 2) ; Belgium (1, 2) ; Bulgaria (1, 2) ; Czechoslovakia (1, 2) ; Danzig (1, 2) ; Denmark (1, 2) ; Estonia (1, 2) ; Finland (1, 2) ; France (1, 2) ; Germany (1, 2) ; Greece (1, 2) ; Hungary (1, 2) ; Italy (1, 2) ; Latvia (1, 2) ; Lithuania (1, 2) ; Luxembourg (1, 2) ; Netherlands (1, 2) ; Norway (1, 2) ; Poland (1, 2) ; Portugal (1, 2) ; Rumania (1, 2) ; Saar Basin (1, 2) ; Serb-Croat-Slovene Kingdom (1, 2) ; Spain (1, 2) ; Sweden (1, 2) ; Switzerland (1, 2).

REFUGEES : Greek—(1) Declaration relating to the settlement of refugees in Greece and the creation for this purpose of a Refugee Settlement Commission (Geneva Sept. 29, 1923) ; (2) Additional Act, Geneva, Sept. 19, 1924.

Ratification : Greece (2), Dec. 4, 1924.

— **Russian**—Arrangement with regard to the issue of certificates of identity. (Geneva July 5, 1922.)

Accession : Japan, Feb. 1, 1924.

SANITARY CONVENTION : Revised convention. (Paris, Jan. 17, 1912.)

Accession : Union of Soviet Socialist Republics, Nov. 6, 1925.

Ratification : Mexico *, Oct. 31, 1924.

SPITZBERGEN TREATY. (Paris, Feb. 9, 1920.)

Ratifications : Denmark, Jan. 24, 1924 ; Germany, Sept. 7, 1925 ; Japan, Jan. 1925.

Accessions : Belgium ; Bulgaria ; China ; Egypt ; Finland ; Greece ; Hejaz ; Monaco ; Rumania ; Serb-Croat-Slovene Kingdom ; Switzerland, June 30, 1925.

STATISTICS : International Commercial—Convention. (Brussels, Dec. 31, 1913.)

Ratification : Netherlands, March 11, 1925.

Accession : Czechoslovakia, Oct. 30, 1924.

TANGIER : International Statute for—Convention. (Paris, Dec. 18, 1923–Feb. 7, 1924.)

Accessions : Belgium, Dec. 6, 1924 ; Netherlands, Aug. 1, 1925 ; Sweden, Sept. 19, 1924.

WEIGHTS AND MEASURES : Revised Convention. (Paris, Oct. 6, 1921.)

Ratifications : Bulgaria, Aug. 27, 1925 ; Hungary, Aug. 14, 1925 ; Uruguay, Dec. 2, 1925.

Accessions : Poland, May 12, 1925 ; Union of Soviet Socialist Republics, Aug. 12, 1925.

WHITE SLAVE TRADE : Convention. (Paris, May 18, 1904.)

Accession : Bulgaria, April 27, 1925.

— Traffic Convention. (Paris, May 4, 1910.)

Ratification : Sweden, June 30, 1925.

Accessions : Bulgaria, April 27, 1925 ; Iraq, May 7, 1925 ; Japan.

— Traffic in Women and Children : Convention. (Geneva, Sept. 30, 1921.)

Ratifications : Hungary, April 25, 1925 ; Latvia, Feb. 12, 1924 ; Rumania, March 29, 1925 ; Sweden, June 9, 1925.

Accessions : Bulgaria, April 29, 1925 ; Iraq, May 15, 1925.

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